Entered

FILED

FEB 28 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEO-PLEX CORPORATION, et al,

Defendants.

86-C-1054-E

ORDER

The court has for consideration the Report and Recommendation of the Magistrate filed December 29, 1989, in which the Magistrate made recommendations on pending motions for summary judgment. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate should be and hereby is affirmed.

It is therefore Ordered that defendant Hanes' Motion for Summary Judgment and defendant Washington's Motion for Summary Judgment should be and are denied.

It is further ordered that the Motion of the United States for Summary Judgment is granted and judgment is entered for plaintiff and against defendants in the amount of $100,000, the maximum civil penalty award of $2,500 for forty installations of the Itron catalytic converter, constituting forty violations of § 203(a) of the Clean Air Act, 42 U.S.C. § 7522(a).

Dated this 27th day of February, 1990.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

OBA 6731

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELBA S. OWENS,

Plaintiff,

vs

STANDARD PARTS, INC., an Oklahoma corporation, AMERICAN FIDELITY ASSURANCE COMPANY, EQUITABLE PLAN SERVICES, INC., and LOYALTY LIFE INSURANCE COMPANY,

Defendants.

No. 89-C-284-C

ORDER OF DISMISSAL

NOW on this 28th day of February, 1990, the Joint Application for order of Dismissal filed by the parties herein, comes before the Court. Finding that the parties hereto have settled the claims for relief sought herein,

THE COURT FINDS AND ORDERS that the Plaintiff's cause of action is dismissed with prejudice to the refiling thereof. Further, that each party shall bear its own costs and fees incurred herein.

(Signed) H. Dale Cook

JUDGE

APPROVED AS TO FORM AND CONTENT:

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582-4930

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

CASSANDRA COBBS,

Plaintiff,

vs.

LINDA A. SCOTT and ROGER SCOTT,

Defendants.

Case #89-C-772-C

ORDER

NOW on this 28 day of February, 1990, this matter comes on for hearing pursuant to the Joint Application for Dismissal Without Prejudice, and the Court finds justifiable cause therefor.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said Application be granted and that the above-entitled matter be dismissed without prejudice to re-filing against defendant ROGER SCOTT.

(Signed) H. Dale Cook

JUDGE

BI19:COBBS.OAD:cc

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAYMOND A. DROZ,

Plaintiff,

vs.

AMERICAN GENERAL LIFE INSURANCE COMPANY OF OKLAHOMA and AMERICAN GENERAL LIFE & ACCIDENT INSURANCE COMPANY,

Defendants.

Case No. 89-C-635-E

ORDER

On this 27th day of Feb., 1990, the Court, after reviewing the Motion To Dismiss filed herein by Defendants American General Life and Accident Insurance Company ("American General") and American General Life Insurance Company of Oklahoma ("American General of Oklahoma"), and the Confession, in Part, and Response, in Part, to Motion to Dismiss and Application for Permission to File Amended Complaint, filed herein in response by Plaintiff, Raymond A. Droz ("Droz"), finds that the case herein against American General of Oklahoma should be dismissed, that Droz's claims set forth under his First Cause of Action (pages 5 and 6 of the Complaint) and his Second Cause of Action (pages 6 and 7 of the Complaint), and based upon age discrimination, should be dismissed with prejudice, that Droz's Amended Complaint should be approved for filing herein instanter, and, that the remaining Defendant, American General, should have 20 days from the date hereof to file its Answer.

//

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that all claims asserted herein by Droz against American General of Oklahoma are hereby dismissed without prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Droz's claims set forth under the First Cause of Action at pages 5 and 6 of the Complaint and Droz's Second Cause of Action set forth at pages 6 and 7 of the Complaint, and based upon age discrimination, are hereby dismissed with prejudice as to both Defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Droz's Amended Complaint hereby is approved for filing herein instanter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the remaining Defendant, American General Life and Accident Insurance Company hereby is granted 20 days from the date hereof to file its Answer.

UNITED STATES DISTRICT JUDGE

Approved:

Earl Wolfe, Attorney for
the Plaintiff
The Hartford Building
110 South Hartford
Tulsa, OK 74120-1834

Loyal J. Roach, Attorney for
the Defendants
Suite 660-Park Centre
525 South Main
Tulsa, OK 74103

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILL B. HAITHCOAT and BEVERLY J. HAITHCOAT,
Plaintiffs,

vs.

Case No. 86-C-995-E

OWENS-CORNING FIBERGLAS CORPORATION, THE CELOTEX CORPORATION, EAGLE-PICHER INDUSTRIES, INC., ARMSTRONG WORLD INDUSTRIES, INC., GAF CORPORATION, KEENE CORPORATION, PITTSBURGH CORNING CORPORATION, NICOLET, INC., RAYMARK INDUSTRIES, INC., OWENS-ILLINOIS, INC., H. K. PORTER COMPANY, INC., FIBREBOARD CORPORATION, CROWN CORK & SEAL COMPANY, INC., and COMBUSTION ENGINEERING, INC.
Defendants.

STIPULATED JOINT MOTION FOR, AND ORDER OF, DISMISSAL WITH PREJUDICE, OF ALL CLAIMS AS TO DEFENDANTS, ARMSTRONG WORLD INDUSTRIES, INC., GAF CORPORATION AND KEENE CORPORATION
Fed.R.Civ.P. 41(a)(2)

M O T I O N

Plaintiffs, Bill B. Haithcoat and Beverly J. Haithcoat, and the Defendants, Armstrong World Industries, Inc., GAF Corporation and Keene Corporation, jointly move this Court for an Order of Dismissal With Prejudice of the above-styled action.

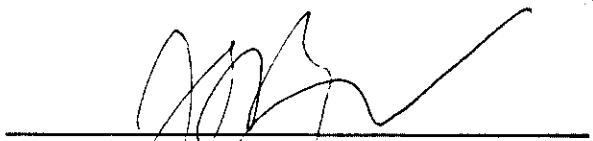
O R D E R

Upon the above and foregoing Joint and Stipulated Motion for Order of Dismissal With Prejudice, the above-styled action is hereby dismissed with prejudice as to Armstrong World Industries, Inc., GAF Corporation and Keene Corporation, each party to bear its own costs.

UNITED STATES DISTRICT COURT JUDGE

259

APPROVED:



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(918) 584-0810
Counsel for Defendants, Armstrong World Industries, Inc. GAF Corporation, & Keene Corporation

CERTIFICATE OF MAILING

This is to certify that on the 28th day of February, 1990, a true and correct copy of the above and foregoing was placed in the United States Mail, postage prepaid, addressed to all counsel of record as shown on the attached service list.

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Michael J. Edwards

HAITHCOAT

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JOHN WIGGINS
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1400 AMERICAN FIRST TOWER
OKLAHOMA CITY, OKLAHOMA 73102

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CAROLYN THOMAS, et al.,	)	
	)	
Plaintiffs,	)	
vs.	)	Case No. 89-C-1061-C
	)	
STATE OF OKLAHOMA EX REL. DEPARTMENT OF HUMAN SERVICES,	)	
	)	
Defendant.	)	

FILED
FEB 27 1990
Jack C. Silver, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL AS TO CERTAIN PLAINTIFFS

COME NOW Robbie Bradfield and Sherrian D. Roberts and dismiss their claim in the above styled and numbered action as against Defendant without prejudice.

FRASIER & FRASIER

BY: _____

Steven R. Hickman, OBA #4172
1700 Southwest Boulevard
P. O. Box 799
Tulsa, OK 74101
918/584-4724

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of February, 1990, I mailed a true and copy of the above and foregoing instrument to:

David Brown
Department of Human Services
Sequoya Building
P.O. Box 53025
Oklahoma City, OK 73152-3025

with proper postage thereon fully prepaid.

_____
Steven R. Hickman

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
JERRY GRANT BAKER, d/b/a Jerry's Hickory House, d/b/a Jerry's Restaurant & Lodge, and PENNELOPE SUE BAKER,	)	Case No. 89-00464-W
	)	Chapter 7
Debtors	)	
	)	
GRAND FEDERAL SAVINGS BANK,	)	
	)	
Plaintiff,	)	
vs.	)	Adv. No. 89-0131-W
	)	
JERRY G. BAKER and PENNELOPE S. BAKER, husband and wife, and SCOTT P. KIRTLEY, Trustee,	)	
	)	
Defendants.	)	No. 89-C-939-B

ORDER APPROVING REPORT AND RECOMMENDATION
OF THE UNITED STATES BANKRUPTCY COURT

On October 13, 1989, pursuant to a Motion to Abstain filed by the Plaintiff herein, the United States Bankruptcy Court for the Northern District of Oklahoma entered its Report and Recommendations for the United States District Court for the Northern District of Oklahoma, which said Report and Recommendations was served upon the parties in this action and no objection thereto having been filed, the Report and Recommendation is approved. See 28 U.S.C. §157(b)(1).

AND IT IS SO ORDERED.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 87-CR-45-E
	)	88-C-297-E
LAWRENCE CANTU SAENZ,	)	89-C-639-E
	)	
Defendant.	)	

O R D E R

This matter is before the Court on the petition of Lawrence C. Saenz for relief under 28 U.S.C. §2241 and 2255. This Court previously has considered and denied a petition by this Defendant Petitioner. See Order of September 19, 1988. In that order the Court directed Petitioner to address his complaint regarding the actions of the parole commission to the United States District Court for the District of Kansas, the district in which Petitioner is incarcerated. The record reflects that Petitioner filed a petition with the United States District Court in Kansas, pursuant to Section 2241 but, that Petitioner failed to raise his complaint regarding the actions of the Parole Commission. Instead, Petitioner asserted new grounds under Section 2255, namely, that the United States and its agents lacked jurisdiction to proceed against him in the criminal action for which he is confined. The United States District Court appropriately transferred the petition here because such grounds are matters within the scope of §2255 and must be raised in the Court in which Petitioner was sentenced.

These new grounds are, therefore, before this Court. This Court finds that Petitioner's claim that the United States and its agents lacked jurisdiction to proceed against him is frivolous and must be dismissed.

IT IS THEREFORE ORDERED that Petitioner's second petition for a writ of habeas corpus pursuant to 28 U.S.C. §2255 is frivolous and is dismissed.

ORDERED this 27th day of February, 1990.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
ROY OLIVER HOGARD,	Civil No. 90-C-0013-C
Debtor	
ROY OLIVER HOGARD,	
Plaintiff	(Bankruptcy No. 88-03102-C)
v.	Adversary No. 89-0107-C
UNITED STATES OF AMERICA (INTERNAL REVENUE SERVICE),	
Defendant	

ORDER

The Court having considered the United States of America's Motion to Withdraw Appeal,

IT IS HEREBY ORDERED that the United States' appeal shall be and is hereby dismissed.

SIGNED this 26 day of Feb., 1990.

UNITED STATES DISTRICT JUDGE

4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELIZABETH DOLE, Secretary
Department of Labor,

Plaintiff,

vs.

FIRST NATIONAL BANK & TRUST
CO. OF TULSA,

Defendant.

No. 89-C-811-E

O R D E R

In this proceeding Elizabeth Dole, Secretary of the United States Department of Labor (the Secretary) seeks an order compelling Defendant First National Bank & Trust co. of Tulsa (First Tulsa) to comply with a subpoena duces tecum. The subpoena was issued to First Tulsa as part of an investigation conducted by the Pension and Welfare Benefits Administration United States Department of Labor pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq. The Court heard oral argument on February 12, 1990 and, finds as follows.

First Tulsa is the subject of a fiduciary investigation pursuant to 29 U.S.C. §1134(a). The trust department of First Tulsa maintains the records associated with many employee benefit plans whose assets are held by, or for whom services are provided by, First Tulsa within the meaning of ERISA, 29 U.S.C. §1002(3), and are subject to the coverage of ERISA pursuant to 29 U.S.C. §1003(a).

The Secretary issued the subpoena duces tecum to First Tulsa on June 2, 1989 requiring First Tulsa to produce, among other things, all documents in First Tulsa's possession relating to the administration of the employee benefit plans and the handling and investment of plan assets. The Bank resists disclosure of the records sought on the grounds that the Oklahoma Banking Code, Okla.Stat.Ann.tit. 6 §1013(West 1984) and the Right to Financial Privacy Act of 1978, 12 U.S.C.A. §340(West 1989) prohibit disclosure. Section 1013 provides, in part:

> "[e]very bank exercising trust powers ... shall ... keep inviolate all communications and writings made to or by such trustee touching the existence, condition, management and administration of any private trust confided to it ... In any suit or proceeding touching the existence, condition, management or administration of any such trust, the court wherein the same is pending, may require disclosure of any communication or writing.

The Secretary argues and the Court agrees, that this proceeding qualifies under Section 1013 as "a proceeding touching the existence, condition, management or administration" of the trusts First Tulsa oversees. First Tulsa's contention that this is merely a proceeding to determine the scope of the Secretary's subpoena power misconstrues the nature of these proceedings. Disclosure is, therefore, permissible under section 1013. Because the Court finds that this proceeding comes within the areas where court-ordered disclosure is permissible it is unnecessary to address whether ERISA's provisions preempt Oklahoma law.

First Tulsa also argues that the provisions of the Right to Financial Privacy Act, 12 U.S.C.A. §3401 et seq., prohibit disclosure. First Tulsa asserts that the requested documents relate to "customers" as that is defined by the Act because a number of the plans managed by First Tulsa involve IRA rollover accounts, KEOGH plans and, plans involving individuals or partnerships of five or fewer individuals. The Secretary argues, however, that employee benefit plans do not involve "persons" under the Act, are not "customers" under the Financial Privacy Act and, records of these plans are not covered by the Act because they are not "customer financial records." The Secretary emphasizes that IRA's and KEOGH's are qualified plans held in custodial accounts as trusts and cannot be considered records of an account held in the individual customer's name under Section 3401(5) of the Financial Privacy Act. The Secretary distinguishes these accounts from customer accounts on the basis of the deposit and withdrawal restrictions and, the existence of the bank as an intermediary.

A "customer" is defined under the Act as "any person or authorized representative of that person who utilizes or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name". 12 U.S.C.A. §3401(5). A "person" is defined as "an individual or partnership of five or fewer individuals." 12 U.S.C.A. §3401(4). Courts have narrowly construed these provisions against the general rule that a bank customer has no legitimate expectation of privacy

in his or her account, articulated in United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619 (1976), see e.g., Pittsburg National Bank v. United States, 771 F.2d 73, 75 (3d Cir. 1985); Duncan v. Belcher, 813 F.2d 1335, 1337 (4th Cir. 1987). The Financial Privacy Act creates narrow exceptions to this rule. 12 U.S.C. §3401(2). Courts have held that records of employee benefit plans are not "customers" and, therefore, do not come within the provisions of the Act. E.g. Donovan v. National Bank of Alaska, 696 F.2d 678, 683-684 (9th Cir. 1983).

The Court finds that the documents requested are not within the scope of the Financial Privacy Act. The employee benefit plans are neither individuals nor partnerships comprised of five or fewer individuals. The plans do not thus qualify as persons who may be customers, as that is defined in Section 3401(5). The records of the employee benefit plans do not, therefore, qualify as financial records protected by the Act against disclosure.

In any event, the Secretary contends that should First Tulsa ever clearly specify that any of the records sought do in fact contain customer information, the Secretary will issue a certificate of compliance pursuant to §3413(h)(1)(A) of the Financial Privacy Act, the non-customer target exception.

IT IS THEREFORE ORDERED that First National Bank & Trust Co. of Tulsa proceed forthwith to comply with the subpoena duces tecum issued to it June 2, 1989, by the Pension and Welfare Benefits Administration, United States Department of Labor and, that the Clerk of the Court administratively terminate this proceeding in

his records.

ORDERED this 27th day of February, 1990.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVEN A. WAKEFIELD and LINDA M. WAKEFIELD, personally, and T/A BRIARCLIFFE RV RESORT & YACHT CLUB, and FIRST INSURANCE INVESTORS, INC.,

Plaintiffs,

vs.

No. 89-C-396-E

CHARLIE PHIPPS, JR., AS TRUSTEE OF TRI-SYNDICATED TRUST GROUP; CHARLIE PHIPPS, JR., individually; PHIPPS, PHIPPS & ASSOCIATES, a law firm which is either a corporation or an unincorporated association; TRI-SYNDICATED TRUST GROUP, a Trust; THE XHTCX TRUST, THE DYNASTY MASTER TRUST, and THE EXPO-TRUST,

Defendants.

ORDER AND JUDGMENT

This matter is before the Court to fix the amount of damages and award judgment to Plaintiffs against Defendants. The Court previously has granted default judgment in favor of Plaintiffs and against Defendants. Defendant Charlie Phipps, Jr. has been dismissed. The Court heard evidence regarding damages on January 5, 1990 and makes the following findings and conclusions and awards judgment herein.

This case arises from the failure of Defendants to furnish a letter of credit necessary for Plaintiffs to secure a $52 million

dollar loan and Defendants' later failure to provide Plaintiffs with a $10 million dollar interim loan. The evidence is that Steven Wakefield is an investment banker who, in 1988, was presented with a business opportunity to buy a financially troubled Pennsylvania insurance company called Benefits and Services Co. (BASECO) by organizing his own company, First Insurance Investors, Inc. (First Insurance), and merging it with BASECO. Wakefield and First Insurance obtained a loan commitment from Banca Nazionale del Lovoro (BNL) whereby BNL would lend $52 million to First Insurance upon certain terms and conditions. The loans were to be secured by a standby letter of credit issued by and payable at Chemical Bank, New York, guaranteeing repayment of 100% of the principal and 100% of the interest on the loan.

Wakefield became acquainted with Defendant Charlie Phipps, Jr. (Phipps) before the actual draft of the proposed credit agreement with BNL. Phipps is the manager and trustee of the Defendant trusts. Tri-Syndicated Trust Group is a trust composed of XHTCX Trust, the Dynasty Master Trust and the Expo-Trust (the trust Defendants). Phipps agreed in August 1988 to underwrite the letter of credit necessary for Wakefield to secure the $52 million loan from BNL.

For reasons not attributable to Plaintiffs, Defendants failed to underwrite the letter of credit to secure the loan during August, September, October or November 1988. Throughout these months Phipps, nevertheless, reaffirmed Defendants' commitment to Plaintiffs and assured them that a closing date was imminent.

Defendants' delay resulted in problems for Plaintiffs so, Plaintiffs and Defendants negotiated a $10 million interim loan from the trusts to Plaintiffs. Plaintiffs put up $18 million in collateral consisting of notes, real estate and cash. Plaintiffs intended to use the $10 million for several purposes. First, $3 million would be put toward Briarcliffe RV Resort & Yacht Club, a recreational vehicle park owned by Mr. and Mrs. Wakefield in Myrtle Beach, South Carolina; $2 million was to be used to retire a second mortgage debt to Pittsburgh National Bank and $1 million was to be used for working capital for the upcoming 1989 summer season. Second, $2 million was to be used for the purchase of Macawber Engineering, Inc., preferred stock. Third, $1 million was to be used for an interim loan to WorldClass Industries. Last, the balance was to be retained as working capital by First Insurance, minus an $800,000 fee to Phipps and a $400,000 fee to brokers.

The Briarcliffe resort had first and second mortgages against it. Plaintiffs executed a third mortgage in favor of Defendants. Mr. Wakefield testified that Briarcliffe is a recreational vehicle resort with a value based upon memberships and the fair market value of the real property. The annual membership income is based upon the Wakefields' ability to advertise and sell the memberships in the forepart of each year. It is necessary for the Wakefields to borrow funds to finance the promotional activities. The Defendants' failure to fund the interim loan and the Defendants' encumbering of the property prevented Plaintiffs from timely starting their 1989 promotional activities; Plaintiffs neither had

the money from Defendants nor could find other money as a result of the Defendants' third mortgage filed on the property. Briarcliffe is now in foreclosure proceedings.

Plaintiffs were forced to breach their agreement to loan $1 million to Worldclass Industries and, further, lost the opportunity to realize fees as a result of WorldClasses' raising of equity and debt of $33,000,000 from plans developed by Plaintiffs.

Phipps knew that Plaintiffs intended to make additional investments in Macawber and WorldClass once the $52 million transaction was completed and knew that these two companies were relying on Plaintiffs' performance. Despite assurances from Phipps, the Defendants have not funded the $10 million loan.

The Defendants' failures to fund the $10 million loan and to underwrite the $52 million letter of credit have caused Plaintiffs damages which are calculable with reasonable certainty. Plaintiffs' evidence regarding the calculation of their damages is unrefuted. These damages are outlined below.

BASECO Acquisition

Plaintiffs anticipated fees of $1,725,000, or 5%, from a $35 million investment in BASECO. Of these fees, $25,000 were prepaid, leaving anticipated fees of $1,700,000.

Plaintiffs presented evidence that after reorganization they reasonably anticipated profits by 1993 and that the value of net earnings anticipated in 1993 discounted to present value at the rate of 8% equals $28,150,000. Plaintiffs presented evidence that they reasonably anticipated such profits on the basis of previous

business activities, an expectation of continuing relationships with agents and based upon the quality and accuracy of the business and marketing plans BASECO developed with First Insurance.

The total lost profits from the BASECO investment, therefore, equal $29,850,000.

WorldClass Industries Loan

Plaintiffs reasonably anticipated certain profits from their investment in WorldClass, which was commencing steel operations after purchasing three large plants known as the "Homestead Properties" from the former U.S. Steel Corporation. Plaintiffs planned not only to invest but Wakefield also developed plans for WorldClass to raise additional funds. Plaintiffs anticipated the following:

1. a 2% fee from the total $33 million of debt and equity raised, or $660,000.
2. an additional 5% fee for raising debt of $27 million, or $1,350,000.
3. an additional 10% fee for raising equity of $6 million, or $600,000.

The total fees anticipated by Plaintiffs were $2,610,000.

Briarcliffe RV Resort & Yacht Club

Plaintiffs lost memberships valued at $5,100,000 and the value of the real property, appraised at $11,955,000. These figures total $16,055,000. After subtracting the total indebtedness on the property of $6,580,000, the total Briarcliffe loss equals $9,475,000.

The total losses represented by the BASECO, WorldClass and Briarcliffe losses equal $41,935,000.

Having found that Defendants agreed to furnish a $52 million letter of credit from a bank suitable to BNL and failed to do so without any fault of Plaintiffs and having found that defendants agreed to make a $10 million interim loan and failed to do so and as a result of the tying up of Plaintiffs' property by lien, Plaintiffs are entitled to judgment against the trust Defendants requiring Defendants to furnish such letter of credit, and to immediately, pending the furnishing of same, to advance Plaintiffs $9,200,000.

Judgment is awarded Plaintiffs in the alternative if the trust Defendants do not within ten (10) days furnish such $9,200,000 to Plaintiffs, or if within ten (10) days Defendants do not furnish such letter of credit, Plaintiffs are alternatively given judgment against the trust Defendants for the sum of $41,935,000.00 actual damages.

ORDERED this 21st day of February, 1990.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LAWRENCE CANTU SAENZ,

Defendant.

No. 87-CR-45-E
88-C-297-E
89-C-639-E

O R D E R

This matter is before the Court on the petition of Lawrence C. Saenz for relief under 28 U.S.C. §2241 and 2255. This Court previously has considered and denied a petition by this Defendant Petitioner. See Order of September 19, 1988. In that order the Court directed Petitioner to address his complaint regarding the actions of the parole commission to the United States District Court for the District of Kansas, the district in which Petitioner is incarcerated. The record reflects that Petitioner filed a petition with the United States District Court in Kansas, pursuant to Section 2241 but, that Petitioner failed to raise his complaint regarding the actions of the Parole Commission. Instead, Petitioner asserted new grounds under Section 2255, namely, that the United States and its agents lacked jurisdiction to proceed against him in the criminal action for which he is confined. The United States District Court appropriately transferred the petition here because such grounds are matters within the scope of §2255 and must be raised in the Court in which Petitioner was sentenced.

These new grounds are, therefore, before this Court. This Court finds that Petitioner's claim that the United States and its agents lacked jurisdiction to proceed against him is frivolous and must be dismissed.

IT IS THEREFORE ORDERED that Petitioner's second petition for a writ of habeas corpus pursuant to 28 U.S.C. §2255 is frivolous and is dismissed.

ORDERED this 27th day of February, 1990.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HELEN JENEAN BURK,

Plaintiff,

v.

KMART CORPORATION,

Defendant.

Case No. 86-C-440-B

ORDER

Before the Court for consideration is the Motion for Judgment Pursuant to Local Rule 15(A) of Defendant, Kmart Corporation. Being advised in the premises, and for the reasons set forth below, the Court finds that the Motion should be sustained.

On November 2, 1989, Defendant filed its Motion for Partial Summary Judgment in which Defendant seeks partial summary judgment with respect to Plaintiff's allegations of retaliation for whistle-blowing for violations of Defendant's internal policies. Plaintiff's response thereto was due on or before November 25, 1989. As of this date, Plaintiff has failed to respond. Pursuant to Local Rule 15(A), Defendant's Motion for Partial Summary Judgment is deemed confessed.

IT IS THEREFORE ORDERED that Defendant's Motion for Judgment Pursuant to Local Rule 15(A) is sustained. By operation of Local Rule 15(A), Defendant's Motion for Partial Summary Judgment is deemed confessed, and is therefore sustained. Judgment is hereby

entered in favor of Defendant, Kmart Corporation, against Plaintiff with respect to Defendant's Motion for Partial Summary Judgment.

ENTERED this 27 day of Feb., 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

C & S EQUIPMENT SALES, INC., an Oklahoma corporation,

Plaintiff,

vs.

MICHAEL T. RAWLINS; S&S ERECTION AND RENTALS, INC., a Missouri corporation; RAWLINS MANUFACTURING, INC., an Oklahoma corporation; and PAVITER CORPORATION, a corporation of the Republic of Singapore,

Defendants.

No. 89-C-1018-C

ORDER

Before the Court are the motions to remand of plaintiff and of defendants Michael T. Rawlins and Rawlins Manufacturing, Inc.

Plaintiff filed its petition in state court on November 9, 1989, seeking a declaratory judgment as to the ownership and rights of possession of certain equipment. Apparently, the facts are as follows. Defendant Paviter purchased certain tire manufacturing equipment in February, 1987. The equipment remained at the B. F. Goodrich plant in Miami, Oklahoma. In February 1989, Paviter hired S&S Erection and Rentals to remove and store the equipment pending shipment to Singapore. On or about February 29,[1] 1989, S&S entered

[1] *This date is taken from the pleadings. The Court notes that there were only 28 days in February on 1989.*

23

into a contract with defendant Rawlins to store the equipment. S&S entered into the contract with Paviter's consent. Pursuant to that contract, the equipment was moved to Rawlins' yard in Miami, Oklahoma. On or about September 15, 1989, Rawlins claimed a possessory lien in the equipment and, pursuant to a lien foreclosure sale, sold the property to himself. This sale was conducted over the objections of Paviter and S&S. On or about September 26, 1989, Rawlins sold the equipment to plaintiff C & S. Rawlins warranted to C & S that the equipment was delivered free of any lien or encumbrance. Plaintiff's state court petition seeks a judicial determination as to all claims in the property, and included an allegation that Rawlins had not delivered all of the equipment to plaintiff. The petition alleges that S&S is a Missouri corporation, that Paviter is a Singapore corporation, that Rawlins Manufacturing is an Oklahoma corporation and that Rawlins is an Oklahoma resident.

On December 7, 1989, Paviter filed its petition for removal in this Court, alleging that Rawlins and Rawlins Manufacturing had been fraudulently joined to defeat diversity jurisdiction. The plaintiff and defendants Rawlins and Rawlins Manufacturing have moved to remand.

The removing party who claims fraudulent joinder must plead such with particularity and prove such by clear and convincing evidence. Spence v. Flynt, 647 F.Supp. 1266, 1271 (D.Wyo. 1986). See also McLeod v. Cities Service Gas Co., 233 F.2d 242, 246 (10th Cir. 1956). In the case at bar, Paviter has submitted an affidavit

stating that all the equipment has been turned over from Rawlins to plaintiff (the implication being that Rawlins has no claim). However, this is contradicted by deposition testimony indicating that it has not all been turned over. The Court must conclude that Paviter has failed to sustain its burden of proof.

Paviter further argues that plaintiff has waived remand by filing an Amended Complaint in this Court. This argument is rejected. The right to secure a remand in the absence of federal jurisdictional subject matter cannot be waived. Jones v. General Tire & Rubber Co., 541 F.2d 660, 662 (7th Cir. 1976).

Finally Paviter asserts that the plaintiff's claim against Paviter and S&S is "separate and independent" and thus removable under 28 U.S.C. §1441(c). The Court believes that a fair reading of the state court petition clearly reflects an allegation of a single wrong for which relief is sought arising out of an interlocked series of events. Under Amer. Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951) a separate and independent claim is not established.

The Court also notes a possible procedural defect in the removal herein. Ordinarily, all defendants in a state action must join in the petition for removal, except for nominal, unknown or fraudulently joined parties. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988). Only Paviter was named in the petition for removal. While arguably Rawlins and Rawlins Manufacturing, as allegedly fraudulently joined, were not required to consent, defendant S&S did not file a consent until December 27,

1989. If this date was more than thirty days after the first defendant was served, such would be untimely. See Getty Oil v. Ins. Co. of North Amer., 841 F.2d 1254, 1261-63 (5th Cir. 1988). No evidence has been presented as to service date, and therefore the Court makes no ruling on this issue.

It is the Order of the Court that the motion of the plaintiff to remand is hereby GRANTED. This action is remanded to the District Court of Ottawa County, State of Oklahoma.

IT IS SO ORDERED this 26th day of February, 1990.

H. DALE COOK
Chief Judge, U. S. District Court

entered for all cases

FILED

FEB 26 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re:	M.D.L. 153	
HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	73-C-175	74-C-151
	74-C-179	74-C-181
	74-C-231	74-C-232
	74-C-434	74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

2798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:	Defendants:
Bernard Broeker	Robert S. Trippet
Francis Broeker	Estate of Norman C. Cross, Jr.
Beatrice B. Warren	E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:	Defendants:
Judson Streicher	Robert S. Trippet
Estate of Joseph Streicher	Estate of Norman C. Cross, Jr.
Estate of Ethel Streicher	E.M. Kunkel
Saint Agnes Hospital	
Diabetes Trust Fund	
J. Streicher & Com.	

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:	Defendants:
Leland Leachman	Robert S. Trippet
James Leachman	
Lester Leachman	
Jerrold Wexler	
Robert Wexler	

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:	Defendants:
Leland Leachman	E. M. Kunkel
James Leachman	Philip A. Chenoweth & Assoc.
Lester Leachman	
Jerrold Wexler	
Robert Wexler	

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:	Defendants:
Leland Leachman James Leachman Lester Leachman Jerrold Wexler Robert Wexler	Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:	Defendants:
W.H. Dennler	Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:	Defendants:
J.A. Buda L.L. Ferguson R. Hart M.F. Kent B.M. Robertson	Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:	Defendants:
Chase Manhattan Bank, N.A. and Verna Sabelle, Executors Computech Arbitrage Partnership B.A. Parkhurst	Robert S. Trippet Estate of Norman C. Cross, Jr. E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil Action No. 88-C-1367-B
ROBERT DUFFIELD, Defendant.	)	

CONSENT DECREE

WHEREAS Plaintiff, United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint herein on October 4, 1988, alleging that Defendant, Robert Duffield, violated Part C of the Safe Drinking Water Act (the "Act'), 42 U.S.C. §§ 300h - 300h-7, and its implementing regulations codified at 40 C.F.R. Part 147, Subpart GGG, and

WHEREAS Defendant is a person as defined in the Act and owned and operated two saltwater disposal wells known as Well Number 4 and Well Number 5, located in the Southwest Quarter of Section 33, Township 20 North, Range 10 East, Keystone District, Osage County, Oklahoma, which wells are subject to the Act and its implementing regulations; and

WHEREAS the United States and Robert Duffield, by their respective attorneys, having each consented to the making and entering of this Consent Decree without trial of any issues, and the Court having considered the matter and being duly advised, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties, pursuant to Section 1423(b)(1) of the Act, 42 U.S.C. § 300h-2(b)(1), and 28 U.S.C. §§ 1331, 1345 and 1355. Venue lies in this District, under 28 U.S.C. §§ 1391(b) and 1395(a). The Complaint states a claim upon which relief can be granted.

APPLICABILITY OF DECREE

2. The provisions of this Consent Decree shall apply to and be binding upon the parties to this Consent Decree, their officers, directors, agents, servants, employees, successors, assigns, and all persons, firms, and corporations acting under, through, or for them or in active concert or participation with them.

SETTLEMENT OF CIVIL PENALTY CLAIMS

3. Robert Duffield shall pay to the United States the sum of TWELVE THOUSAND ($12,000.00) DOLLARS, plus interest, in settlement of all claims for civil penalties alleged in the United States' complaint. Payment of SIX THOUSAND ($6,000.00) DOLLARS shall be made within thirty (30) days of the entry of this Consent Decree. Payment of the sum of SIX THOUSAND ($6,000.00) DOLLARS, plus interest as established from the date of entry of this Consent Decree, shall be made within six (6) months of the date of entry of this Consent Decree. Interest shall accrue at the rate established under 28 U.S.C. § 1961. All payments shall be by certified or cashier's check made payable to

the "Treasurer of the United States of America." Payment shall be delivered at the Office of the United State Attorney for the Northern District of Oklahoma, U.S. Courthouse, Room 3600, 333 West Fourth Street, Tulsa, Oklahoma 74103. Simultaneously, copies of the check and the letter tendering such check shall be mailed to the Office of Regional Counsel, U.S. EPA, Region VI, 1445 Ross Avenue, Dallas, Texas 75202, Attn; Ms. Deborah Strickely; and to the Chief, Environmental Enforcement Section, Land & Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, D.C., 20044, attention D.J. No. 90-5-1-1-3142. The payment of this civil penalty shall be full satisfaction of the United States' claim for civil penalties for violations alleged in the complaint filed herein through the date of lodging of this Consent Decree.

COMPLIANCE

4. Within ninety (90) days of entry of this decree, Defendant shall take one of the following actions with respect to Well No. 5: (1) plug the well in accordance with the requirements of the Act and its implementing regulations at 40 C.F.R. Part 147, Subpart GGG; or (2) convert the well to a well for the production of oil or gas.

5. Defendant shall comply with all applicable regulations pertaining to Well No. 4, including but not limited to the requirements of 40 C.F.R. § 147.2913(b) to monitor the injection pressure (pounds per square inch) and rate (barrels per day) at least monthly and report these results to EPA annually.

STIPULATED PENALTIES

6. If Defendant fails to fully and timely comply with any requirement of this Consent Decree, Defendant shall pay stipulated penalties in the amount of $100 per day for each day of failure to comply with any requirement of this Consent Decree.

7. In any dispute over the applicability of stipulated penalties, Defendant shall bear the burden of proving that it is not subject to the stipulated penalties.

8. Defendant shall pay stipulated penalties in the exact manner set forth in paragraph 3 above, and provide copies of the transmittal letter and check to the parties indicated therein.

DELAYS OR IMPEDIMENTS TO PERFORMANCE

9. If any event occurs which causes or may cause Defendant to violate any provision of this Consent Decree, Defendant shall notify in writing the Court and all parties within ten days of when Defendant first knew of the event or should have known of the event by the exercise of due diligence. In this notice Defendant shall specifically reference this section of the Decree and describe in detail the anticipated length of time the violation may persist, the precise cause or causes of the violation, and the measures taken or to be taken by Defendant to prevent or minimize the violation and any future violations. Defendant shall adopt all reasonable measures to avoid and minimize such violations.

10. Failure by Defendant to fully and timely comply with the notice requirement of this section as specified above shall render this section void and of no effect as to the particular event involved, and shall constitute a waiver of Defendant's right to obtain an extension of time for its obligations under this section based on such event.

11. EPA shall notify Defendant in writing of EPA's agreement or disagreement with Defendant's claim of a delay or impediment to performance within 45 days of receipt of Defendant's notice provided under this section. If EPA Region VI agrees that the violation has been or will be caused entirely by circumstances beyond the control of Defendant or any entity controlled by Defendant, including its contractors, and that Defendant could not have foreseen and prevented such violation by the exercise of due diligence, the parties may stipulate to an extension of the particular compliance requirement affected by the delay, by a period not exceeding the delay actually caused by such circumstances. Such a stipulation shall be filed as a modification to this Consent Decree pursuant to the Modification procedures established in this Decree. Defendant shall not be liable for stipulated penalties for the period of such delay.

12. If EPA does not agree with Defendant's claim of a delay or impediment to performance, Defendant may submit the matter to the Court for resolution pursuant to the Dispute Resolution Procedures established in this Decree. If Defendant submits the matter to the Court for resolution and the Court

determines that the violation has been or will be entirely caused entirely by circumstances beyond the control of Defendant or any entity controlled by Defendant, including its contractors, and that Defendant could not have foreseen and prevented such violation by the exercise of due diligence, Defendant shall be excused as to the violation, but only for the period of time the violation continues due to such circumstances.

13. Defendant shall bear the burden of proving that any delay or violation of any requirement of this Consent Decree was caused or will be caused entirely by circumstances beyond the control of Defendant or any entity controlled by Defendant, including its contractors, and that Defendant could not have foreseen and prevented such violation by the exercise of due diligence. Also, Defendant shall bear the burden of proving the duration and extent of any delay attributable to such circumstances. An extension of one compliance date based on a particular event does not necessarily result in an extension of a subsequent compliance date or dates. Defendant must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

14. Unanticipated or increased costs or expenses associated with the implementation of this Decree, changed financial circumstances, or technical problems shall not, in any event, serve as a basis for changes in this Decree or extensions of time under this Decree.

RIGHT OF ENTRY

15. Until termination of this Consent Decree, EPA and/or its representatives, contractors, consultants, and the attorneys for the United States shall have the authority to enter any facility covered by this Decree, during reasonable hours, upon presentation of credentials to the manager of the facility, or in the manager's absence, to the highest ranking employee present on the premises, for the purpose of:

A. monitoring the progress of activities required by the Decree.

B. verifying any date or information submitted to the EPA in accordance with the terms of the Decree;

C. obtaining samples, and upon request, splits of any samples taken by Defendant or its contractors and consultants; and/or

D. assessing Defendant's compliance with this Decree.

This provision in no way affects or reduces any rights of entry or inspection that the United States has under any Federal law or regulation.

DISPUTE RESOLUTION

16. If the parties are unable to agree upon any procedure, plan, standard, requirement, or other matter described herein, or in the event a dispute should arise among the parties regarding the implementation of this Decree, the parties shall attempt to resolve the dispute through informal negotiation. In the event the parties are unable to resolve the dispute, Defendant shall follow the final position of the United States unless Defendant files a petition with the Court for the

resolution of the dispute within 30 days of receipt of the United States' final position concerning the dispute. In its petition to the Court, Defendant shall set out the nature of the dispute with a proposal for its resolution. The United States shall have 30 days to file a response with an alternative proposal for resolution. In any such dispute, Defendant shall have the burden of proving that the United States's proposal is arbitrary and capricious and not in accord with the objectives of this Decree, and that Defendant's position will achieve compliance with the terms and conditions of this Decree and the Act in an expeditious manner.

NON-WAIVER PROVISIONS

17. This Consent Decree in no way relieves Defendant of his obligations to comply with all applicable Federal, State and local statutes and regulations.

18. This Consent Decree in no way affects the right or remedies available to the United States for any violations by the Defendant of Federal or State laws, regulations or permit conditions not specifically the subject of this Consent Decree.

19. This Consent Decree is not and shall not be interpreted to be a permit for the under ground injection of fluids, nor shall it in any way relieve Defendant of any obligation imposed by any permit issued pursuant to the Act.

COSTS OF SUIT

20. Each party shall bear its own costs and attorneys fees of this action.

PUBLIC COMMENT

21. Final approval by the United States and entry of this Consent Decree by the Court are subject to the requirements of 28 C.F.R. § 50.7, which requires, inter alia, notice of this Consent Decree and an opportunity for public comment.

CONTINUING JURISDICTION OF THE COURT

22. This Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the implementation of this Consent Decree.

TERMINATION

23. This Consent Decree shall terminate upon compliance with the requirements of paragraph 4 of this Consent Decree and payment of the civil penalty provided for herein.

MODIFICATION

24. This Consent Decree may not be modified except upon the written consent of all parties hereto, or their successors or assigns, and the approval of the Court.

SIGNATORIES

25. The representatives of each party to this Consent Decree certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

THE UNDERSIGNED PARTIES enter into this Consent Decree in Civil Action No. 88-C-1367-B (N.D.Oklahoma), relating to the lease owned and operated by Robert Duffield, and submit it to the

Court, subject to the public comment requirements of paragraph 21, that it may be approved and entered.

FOR PLAINTIFF, UNITED STATES OF AMERICA:

Richard B. Stewart — 10.29.89
RICHARD B. STEWART — DATE
Assistant Attorney General
Land & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

TONY M. GRAHAM
United States Attorney
Northern District of Oklahoma

BY: Nancy Nesbitt Blevins — 11/6/89
NANCY NESBITT BLEVINS — DATE
Assistant United States Attorney
U.S. Courthouse, Room 3600
333 West Fourth Street
Tulsa, Oklahoma 74103

[signature] — August 31, 1989
EDWARD E. REICH — DATE
Acting Assistant Administrator
Enforcement & Compliance Monitoring
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

FOR DEFENDANT, ROBERT DUFFIELD

Richard T. Sonberg — August 11, 1989
Richard T. Sonberg, Attorney at Law — DATE
3636 First National Tower
Tulsa, OK 74103
(918) 587-0114

SO ORDERED, THIS 26th DAY OF Feb., 1990.

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: DANNY L. STEFANOFF, Debtor, EVELYN HULL, individually, and EVELYN HULL as Personal Representative of the Estate of Ansel Hull, deceased, Plaintiff/Appellant, v. DANNY L. STEFANOFF, Defendant/Appellee.	District Court No.: 89-C-226-B Bankruptcy Case No.: Case No. 88-00700-C Adversary Proceeding No.: 88-0159-C

Now before the Court is the appeal of Evelyn Hull, individually, and Evelyn Hull as Personal Representative of the Estate of Ansel Hull, deceased, from the Final Judgment of the United States Bankruptcy Court for the Northern District of Oklahoma, entered on March 17, 1989. In that order the Bankruptcy Court held that the Appellant had no claim to a Certificate of Deposit held by the Debtor, which was a dischargeable debt under 11 U.S.C. §523(a)(4).

On December 18, 1981, Evelyn and Ansel Hull conveyed 4.6905 acres of land in Tulsa county, Oklahoma, to Terry and Sandra Troxell. In consideration for this conveyance, the Troxells executed a note payable to the Hulls in the amount of $435,000.00 secured by a mortgage on the land. That same day, the Troxells conveyed the 4.6905 acres to a partnership known as South Lewis Ventures, which assumed the Troxells' obligations under the note

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and mortgage with the consent of the Hulls. Danny L. Stefanoff ("Stefanoff") was one of the partners of the South Lewis Ventures.

At some time in late 1982, Stefanoff conceived the idea of building a retirement center on part of the 4.6095 acres using tax exempt bond financing. On December 21, 1983, the 4.6095 acres was platted into Lots 1 and 2, of which Lot 2 was the proposed site of the retirement center. Stefanoff formed Burgundy Place Limited Partnership ("Burgundy Place"), of which he became sole general partner, to acquire Lot 2 from South Lewis Ventures and develop the retirement center.

One of the requirements for closing the acquisition phase of the project was that Burgundy Place obtain title to Lot 2 free and clear of the Hulls' mortgage lien. Originally, the parties intended that Burgundy Place pay South Lewis Ventures $344,404.50 to obtain title to Lot 2. The $344,404.50 would in turn be paid to the Hulls to satisfy their mortgage and obtain a release of the same. However, for tax reasons the Hulls decided that they did not want to receive a lump sum of $344,404.50. In fact, the Hulls never did receive the $344,404.50 nor did they report the $344.404.50 as income. Instead, at the closing on March 1, 1985, the Hulls agreed to release their mortgage on Lot 2 in consideration for a note from Stefanoff in the amount of $344,404.50 secured by a $344,404.50 Certificate of Deposit at the Bank of Oklahoma in Stefanoff's name and all replacements of that Certificate of Deposit ("Certificate of Deposit").

On February 18, 1986, Stefanoff diverted the funds in the

Certificate of Deposit to his business account at Victor Federal Savings and Loan. Stefanoff continued to make the payments under the $344,404.50 note to the estate of Ansel Hull and to Evelyn Hull, personally, until October and November, 1987, respectively. In February or March, 1988, Evelyn Hull discovered that the Certificate of Deposit had been diverted. In March, 1988, the involuntary bankruptcy petition instituting this bankruptcy case was filed against Stefanoff, and an adversary proceeding under 11 U.S.C. §523(a)(4) was brought by Evelyn Hull to determine the dischargeability of the debt under the note.

The Bankruptcy Court determined that Stefanoff was not acting as a fiduciary when he diverted the Certificate of Deposit to his own use, as the agreements between the parties were a note and a security agreement referring to the Certificate of Deposit as collateral to secure repayment of the note and no Trust was mentioned. The Bankruptcy Court found that Hull's money did not fund the Certificate of Deposit, and that the Certificate of Deposit was the property of Stefanoff pledged as collateral to secure the note. Had Stefanoff held the Certificate of Deposit in trust, the court noted that there would have been no need for the note. Because the Certificate of Deposit was determined to be Stefanoff's, the court concluded that no embezzlement occurred.

Appellant raises two issues on appeal: 1) the Bankruptcy Court based its decision upon its concluded fact that "Stefanoff was the owner of the property" and the facts do not support this conclusion, and 2) the Court's legal conclusion that no separation

of legal and equitable title existed under the facts of this case was not supported by an analysis of the case law nor by the purposes to be served generally by the Bankruptcy Code or exceptions from dischargeability.

Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate review of bankruptcy rulings with respect to findings of fact. In re: Morrissey, 717 F.2d 100, 104 (3rd Cir. 1983). However, this "clearly erroneous" standard does not apply to review of mixed questions of law and fact, which are subject to the de novo standard of review. In re: Ruti-Sweetwater Inc., 836 F.2d 1263, 1266 (10th Cir. 1988); In re: Mullett, 817 F.2d 677, 679 (10th Cir. 1987). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

The Bankruptcy Code at 11 U.S.C. §523(a)(4) states that a discharge "does not discharge an individual debtor from any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny".

The Court finds that the Bankruptcy Court did not err in finding that no fiduciary duty was created by the note and security agreement executed by the parties and that no separation of legal and equitable title existed. An express or technical trust, arising by agreement or by statute prior to the commission of a wrongful act, must exist to create the fiduciary capacity discussed in §523(a)(4). In re Stone, 91 BR 589, 593 (D. Utah 1988). There is no applicable statute creating such a trust relationship, and

the documents executed by the parties do not imply a trust nor do they expressly create one.[1] A simple debtor-creditor relationship was created by the documents executed.[2] The Hulls received a security interest in the Certificate of Deposit to secure repayment of the note.

The Bankruptcy Court also correctly found that the money that funded the Certificate of Deposit was Stefanoff's, not Hulls'. The evidence shows that the Hulls originally were to receive the entire sum, but, for tax reasons, decided that they did not want to receive a lump sum. They did not receive the money and therefore did not report it as income or pay taxes on it. They released the mortgage in return for a note and security agreement from Stefanoff, which failed to mention any trust relationship between the parties. The documents clearly designated the Certificate of Deposit as collateral to secure repayment of the note. See attached Defendants' Exhibits 1-3. Had the parties intended that Stefanoff hold the Certificate of Deposit in trust, a note would not have been necessary. The evidence shows that Stefanoff executed the note obligating himself to pay equal monthly installments of principal and interest until December 31, 1991, when the unpaid balance became due. It is clear that the parties had no intent to create a trust.

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[1] *The elements for an express trust include 1) a declaration of trust, 2) a clearly defined trust res, and 3) an intent to create a trust relationship.* Id.

[2] *The fiduciary relationship of §523(a)(4) has been specifically held to not encompass ordinary commercial relationships such as those of principal/agent or debtor/creditor.* Id.

The Bankruptcy Court was therefore correct in concluding that Stefanoff did not embezzle the funds involved, as the Certificate of Deposit was his property. Embezzlement is the fraudulent appropriation of property of another by one to whom such property has been entrusted. In re Wallace, 840 F.2d 762 (10th Cir. 1988). Therefore the debt is not excepted from discharge under §523(a)(4).

The Court finds that the Bankruptcy Court did not err in finding dischargeable the debt sought to be excepted from discharge under 11 U.S.C. §523(a)(4). It is therefore Ordered that the Bankruptcy Court's decision in this matter be and hereby is affirmed.

SO ORDERED THIS 26 day of February, 1989.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

PROMISSORY NOTE

$344,404.50

Tulsa, Oklahoma
March 1, 1985

FOR VALUE RECEIVED, the undersigned, DAN L. STEFANOFF ("Maker") promises to pay to the order of ANSEL HULL and EVELYN HULL, husband and wife ("Holder"), at such place as may be designated in writing by the Holder of this Note, the principal sum of Three Hundred Forty Four Thousand Four Hundred Four and 50/100 Dollars ($344,404.50), together with interest accruing on the unpaid balance thereof at the rate of twelve percent (12%) per annum from the date of execution hereof, both principal and interest payable in lawful money of the United States of America as follows:

The sum of Three Hundred Forty Four Thousand Four Hundred Four and 50/100 Dollars ($344,404.50) shall be payable in equal monthly installments of principal and interest in an amount necessary to fully amortize and pay the Note over twenty (20) years at an interest rate of twelve percent (12%) per annum. The first installment of principal and interest shall be in the amount of Three Thousand Seven Hundred Eighty Three and 88/100 Dollars ($3,783.88) and shall be paid on March 1, 1985, and continuing on the same day of each month thereafter until the 31st day of December, 1991, at which time the entire unpaid balance hereof and all accrued and unpaid interest at the agreed rate shall become due and payable.

The right is reserved in the Maker to prepay this Note in part or in full at any time without penalty as to interest or premium, except that any such prepayment of this Note may be made only after fourteen (14) days' advance written notice thereof has been given to the Holder hereof.

The payment of this Note is secured by a certain Security Agreement of even date herewith, attached hereto as Exhibit "A", covering the personal property described therein (the "Property").

Upon default in the performance or observance of any obligation, term, covenant or condition contained in this Note or the Security Agreement executed as security for this Note or of any instrument now or hereafter securing the payment of this Note, and upon the failure to cure such default in the time allotted as a grace period, if any, then at the option of the Holder hereof, this Note shall immediately become due, payable and collectible, regardless of the date of maturity hereof, and forthwith, without further notice or demand, notice of nonpayment, presentment, protest, notice of dishonor, or other notice of any kind or nature, all of which are expressly waived by the Maker hereof and all endorsers, sureties, guarantors and all other persons who may become liable for all or any part of this obligation. Further, all delinquent payments hereunder shall bear interest at the rate of eighteen percent (18%) per annum from the due date of each such payment until such payment or payments are fully paid. Any and all additional interests which is provided for herein and which has accrued during the existence of a default shall be payable at the time of, and as a condition precedent to, the curing of such default.

If, and as often as, this Note is placed in the hands of an attorney for collection after the same shall for any reason become due, or if collected by legal proceedings or through the probate or bankruptcy courts or legal proceedings under the Security Agreement or under any other instrument now or hereafter securing the payment of this Note, the Maker hereof agrees to pay the Holder hereof a reasonable attorney's fee, together with all court costs which shall be collected as part of the principal hereof.

The undersigned Maker hereof expressly agrees to remain and continue bound for the payment of the principal and interest provided for by the terms of this Note notwithstanding any extension or extensions of the time of, or for the payment of, said principal and/or interest, or any change or changes by way of release or surrender of any real estate held as security for this Note, and waive all and every kind of notice of such extension or extensions, change or changes and agree that the same may be made without the joinder of the undersigned Maker.

DEFENDANT'S EXHIBIT 1

This Note is to be governed by and construed in accordance with the laws of the State of Oklahoma.

Except in the event of the payment of the full principal balance and accrued interest thereon, this Note may be terminated only by a discharge in writing, signed by the party who is the owner and Holder of this Note at the time enforcement of any discharge is sought.

IN WITNESS WHEREOF, the undersigned Maker has executed and delivered this Promissory Note this 12 day of ~~February~~ March, 1985.

"MAKER"

Dan L. Stefanoff

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648-01
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1-2

EXHIBIT "A"

Certificates Of Deposit No.	Name of Bank	Amount	Maturity Date
432569	Bank of Oklahoma NA.	$44,404.50	March 11, 1985

NOTE MODIFICATION AGREEMENT

THIS NOTE MODIFICATION AGREEMENT ("Agreement") is entered into this 1st day of February, 1985, by and between SOUTH LEWIS VENTURES, an Oklahoma general partnership ("South Lewis"), and Ansel Hull and Evelyn Hull, husband and wife ("Hull").

WHEREAS, Terry L. Troxell and Sandra R. Troxell, husband and wife ("Troxell") executed a certain Promissory Note ("Troxell Note"), on the 18th day of December, 1981, as Maker, to Hull, as Holder, in the principal sum of Four Hundred Thirty Five Thousand Dollars ($435,000), and which Troxell Note was secured by a Real Estate Mortgage ("Mortgage") of an even date covering the real property more particularly described on Exhibit "A" attached hereto. Said Mortgage was recorded in the land records of the Tulsa County Clerk on the 23rd day of December, 1981, in Book 4586 at Page 1579.

WHEREAS, Troxell, by General Warranty Deed dated December 18, 1981, conveyed the Property to South Lewis, which General Warranty Deed was recorded in the land records of Tulsa County on the 23rd day of December, 1981, in Book 4586 at Page 1586.

WHEREAS, South Lewis, Hull and Troxell entered into an Assumption Agreement dated the 18th day of December, 1981, whereby Hull consented to South Lewis' assumption of Troxell's obligations under the Mortgage and Troxell Note.

WHEREAS, the outstanding principal balance as of the date hereof under the Troxell Note is Four Hundred Thirty Four Thousand Five Hundred Sixty and 37/100 Dollars ($434,560.37).

WHEREAS, the Property was platted into Lot 1, Block 1, and Lot 2, Block 1, as Lewis Center East (Plat No. 4429) on the 21st day of December, 1983.

WHEREAS, South Lewis desires to transfer, sell and convey Lot 2, Block 1, Lewis Center East, an Addition to the City of Tulsa, Tulsa County, Oklahoma, to Burgundy Place Limited Partnership, an Oklahoma limited partnership, of which Dan L. Stefanoff is the sole general partner.

WHEREAS, Hull and South Lewis desire to allocate the outstanding balance under the Troxell Note as follows:

Lot 1, Block 1 - $90,155.77
Lot 2, Block 1 - $344,404.50.

WHEREAS, South Lewis desires to obtain a partial release from the Mortgage for Lot 2, Block 1, Lewis Center East and reduce the outstanding principal amount under the Troxell Note to Ninety Thousand One Hundred Fifty Five and 77/100 Dollars ($90,155.77), by the payment in the form of a new note in the amount of Three Hundred Forty Four Thousand Four Hundred Four and 50/100 Dollars ($344,404.50) given Hull by Dan L. Stefanoff ("Stefanoff Note").

NOW, THEREFORE, in consideration of Ten Dollars ($10.00) and other good and valuable consideration, the receipt, sufficiency and adequacy of which is hereby acknowledged, the parties agree as follows:

1. That the allocation of the outstanding principal sum under the Troxell Note prior to the Stefanoff Note as follows:

Lot 1, Block 1 - $90,155.77
Lot 2, Block 1 - $344,404.50

2. Hull agrees to execute a partial release of the Mortgage with respect to Lot 2, Block 1, Lewis Center East.

3. Hull agrees to accept as substituted collateral for releasing Lot 2, Block 1 from the Mortgage, the collateral set forth in the Stefanoff Note.

4. That by the execution and delivery of the Stefanoff Note to Hull, Hull acknowledges that the remaining principal balance of the Troxell Note has been reduced to Ninety Thousand One Hundred Fifty Five and 77/100 Dollars ($90,155.77) has been paid to Hull under the Troxell Note.

5. That Ninety Thousand One Hundred Fifty Five and 77/100 Dollars ($90,155.77) is the remaining principal balance of the Troxell Note, which sum shall be paid in equal monthly installments necessary to fully amortize the sum over a twenty (20) year amortization at twelve percent (12%) per annum with the entire remaining balance of principal and interest becoming due and payable on December 31, 1991. Said equal monthly installments shall be in the amount of One Thousand Nine and 14/100 Dollars ($1,009.14).

6. That except as otherwise modified above, the Troxell Note shall remain in full force and effect without amendment.

IN WITNESS WHEREOF, the parties have executed the Note Modification Agreement on the day and year first written above.

"SOUTH LEWIS"

SOUTH LEWIS VENTURES,
an Oklahoma general partnership

By: _____

"HULL"

_____
Ansel Hull

_____
Evelyn Hull

ACKNOWLEDGMENT

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Before me, the undersigned, a notary public in and for said county and state, on this 1st day of ~~February~~ June, 1985, personally appeared _____, general partner of South Lewis Ventures, an Oklahoma general partnership, known to me to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of the general partnership for the uses and purposes therein set forth.

_____
Notary Public

My Commission Expires:

3/24/88

ACKNOWLEDGMENT

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Before me, the undersigned, a notary public in and for said county and state, on this 12 day of ~~February~~ March, 1985, personally appeared Ansel Hull and Evelyn Hull, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Mary M. Alexander
Notary Public

My Commission Expires:

3/5/85

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EXHIBIT "A"

A TRACT OF LAND, CONTAINING 4.690± ACRES, THAT IS PART OF THE S ½ OF THE SW ¼ OF SECTION 17, T-18-N, R-13-E, CITY OF TULSA, TULSA COUNTY, OKLAHOMA, SAID TRACT OF LAND BEING DESCRIBED AS FOLLOWS, TO-WIT: "BEGINNING AT A POINT" ON THE NORTHERLY LINE OF THE S ½ OF THE SW ¼ OF SECTION 17, SAID POINT BEING 990.09' WESTERLY OF THE NORTHEAST CORNER THEREOF, SAID POINT ALSO BEING THE NORTHWEST CORNER OF "DELAWARE SQUARE", CITY OF TULSA, TULSA COUNTY, OKLAHOMA; THENCE SOUTHERLY AND PARALLEL TO THE EASTERLY LINE OF THE S ½ OF THE SW ¼ AND ALONG THE WESTERLY LINE OF "DELAWARE SQUARE" FOR 401.77'; THENCE WESTERLY ALONG A DEFLECTION ANGLE TO THE RIGHT OF 89°-27'-39" FOR 454.92' TO A POINT ON THE EXISTING CENTERLINE OF SOUTH LEWIS AVENUE; THENCE NORTHWESTERLY ALONG A DEFLECTION ANGLE TO THE RIGHT OF 75°-49'-24" AND ALONG SAID CENTERLINE FOR 349.39' TO A POINT OF CURVE; THENCE NORTHWESTERLY ALONG SAID CENTERLINE ON A CURVE TO THE LEFT WITH A CENTRAL ANGLE OF 11°-00' 00", AND A RADIUS OF 235.04', FOR 45.13' TO A POINT OF TANGENCY; THENCE NORTHWESTERLY ALONG SAID TANGENCY AND ALONG SAID CENTERLINE FOR 23.59' TO A POINT ON THE NORTHERLY LINE OF THE S ½ OF THE SW ¼ OF SECTION 17; THENCE EASTERLY ALONG A DEFLECTION ANGLE TO THE RIGHT OF 115°-15'-17" ALONG SAID NORTHERLY LINE FOR 569.48' TO THE "POINT OF BEGINNING" OF SAID TRACT OF LAND

SECURITY AGREEMENT

THIS AGREEMENT made this 1st day of March, 1985, between DAN L. STEFANOFF, of the City of Jenks, County of Tulsa, State of Oklahoma, herein referred to as "Debtor," and ANSEL HULL and EVELYN HULL, husband and wife, of the City of Tulsa, County of Tulsa, State of Oklahoma, herein referred to as "Secured Party."

In consideration of the mutual covenants and promises set forth herein, Debtor and Secured Party agree as follows:

SECTION ONE
CREATION OF SECURITY INTEREST

Debtor hereby grants to Secured Party a security interest in the Collateral, described in Section Two, to secure the performance and payment of that certain Promissory Note executed by Debtor as Maker and dated the 1st day of March, 1985, in the original principal sum of Three Hundred Forty Four Thousand Four Hundred Four and 50/100 Dollars ($344,404.50) given to Secured Party and payable as to principal and interest as therein provided; all costs and expenses incurred by Secured Party in the collection and enforcement of the Note and other indebtedness of Debtor.

SECTION TWO
DESCRIPTION OF COLLATERAL

The Collateral subject to this Security Agreement, herein referred to as "Collateral," is the personal property described on Exhibit "A" which is attached hereto and made a part hereof, and shall further mean those Certificates of Deposits which replace the Certificates of Deposit listed on Exhibit "A" which are rolled over at maturity.

SECTION THREE
OBLIGATIONS OF DEBTOR, GENERALLY

(a) PAYMENT. Debtor shall pay to Secured Party the sum evidenced by the above mentioned Note or any renewals or extensions thereof executed pursuant to this Security Agreement in accordance with the terms of such Note and any other obligations that now exist or may hereafter accrue from Debtor to Secured Party.

(b) WARRANTIES AND REPRESENTATIONS. Debtor warrants and covenants that except for the Security Interest hereby granted, Debtor has, or on acquisition will have, title to Collateral free from any lien, security interest, encumbrance, or claim, and Debtor will, at Debtor's cost and expense, defend any action that may affect Secured Party's security interest in, or Debtor's title to, Collateral.

(c) PERFORMANCE OF AGREEMENT. Debtor shall perform all covenants and agreements set forth in this Security Agreement.

SECTION FOUR
PROCEEDS OF COLLATERAL

Debtor hereby grants to Secured Party a security interest in and to all proceeds of Collateral, as defined by Title 12A, Section 9-306(1) of the Statutes of the State of Oklahoma. This provision shall not be construed to mean that Debtor is authorized to sell, lease or dispose of Collateral without the consent of Secured Party.

SECTION FIVE
FINANCING STATEMENT

At the request of Secured Party, Debtor will join in executing, or will execute as appropriate, all necessary financing statements in a form satisfactory to Secured Party, and will pay the cost of filing such statements. Debtor will execute all other instruments deemed necessary by Secured Party and pay the cost of filing such documents.

DEFENDANT'S EXHIBIT 3

3-1

SECTION SIX
ALIENATION OF COLLATERAL

Debtor will not, without the written consent of Secured Party, liquidate or otherwise dispose of Collateral or any interest therein until this Security Agreement and all debts secured thereby have been fully satisfied.

SECTION SEVEN
TIME OF PERFORMANCE

When performing any act under this Security Agreement and the Note secured thereby, time shall be of the essence.

SECTION EIGHT
WAIVER

Failure of Secured Party to exercise any right or remedy, including but not limited to the acceptance of partial or delinquent payments, shall not be a waiver of any obligation of Debtor or right of Secured Party or constitute a waiver of any other similar default subsequently occurring.

SECTION NINE
DEFAULT

If Debtor fails to pay, within thirty (30) days of the due date, any amount payable on the above mentioned Note or on any other indebtedness of Debtor secured hereby, or shall fail to observe or perform any of the provisions of this Agreement, Debtor shall be in default.

SECTION TEN
REMEDIES

On any default, and at any time thereafter, Secured Party may declare all obligations secured hereby immediately due and payable and may proceed to enforce payment of the same and exercise any and all of the rights and remedies provided by Title 12A, Article 9, Part 5 of the Statutes of the State of Oklahoma as well as any and all other rights and remedies possessed by Secured Party.

SECTION ELEVEN
GOVERNING LAW

(a) This Security Agreement shall be construed according to Title 12A of the Statutes of the State of Oklahoma and other applicable laws of the State of Oklahoma, and all obligations of the parties created hereunder are to be performed in the State of Oklahoma.

(b) All terms used herein that are defined in Title 12A of the Statutes of the State of Oklahoma shall have the same meaning herein as therein defined.

IN WITNESS WHEREOF, the parties have executed this Agreement at Tulsa, Oklahoma on the day and year first above written.

"DEBTOR"

Dan L. Stelamell

"SECURED PARTY"

Ansel Hull

Evelyn Hull

3-2

ACKNOWLEDGMENT

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Before me, the undersigned, a notary public in and for said county and state, on this 1st day of March, 1985, personally appeared Dan L. Stefanoff, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Mary M. Schneider
Notary Public

My Commission Expires:

3/24/85

ACKNOWLEDGMENT

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Before me, the undersigned, a notary public in and for said county and state, on this 1st day of March, 1985, personally appeared Ansel Hull and Evelyn Hull, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Mary M. Schneider
Notary Public

My Commission Expires:

3/24/85

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EXHIBIT "A"

Certificates Of Deposit No.	Name of Bank	Amount	Maturity Date
432569	Bank of Oklahoma N.A.	$344,404.50	March 11, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMSON RESOURCES COMPANY, a corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 89-C-1060-B
DELHI GAS PIPELINE CORPORATION, a corporation,	)	
Defendant.	)	

PARTIAL DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Samson Resources Company, and by reason of settlement, hereby dismisses any and all claims in the above styled matter relating to or arising from the "Perryman Contract".

Respectfully submitted,

BRUNE, PEZOLD, RICHEY & LEWIS

R.K. Pezold
Kenneth J. Treece
Terry J. Baker
Sixth East Fifth Street
Suite 700 Sinclair Building
Tulsa, OK 74103

APPROVED BY:

Steven M. Harris, OBA #3913
Michael D. Davis, OBA #11282
DOYLE & HARRIS
2431 E. 61st Street, Suite 260
Tulsa, OK 74136
(918) 743-1276

469-3-11/ras

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOMBARDIER CREDIT CORPORATION, Plaintiff,	)	
vs.	)	No. 89-C-669-B
JOHN H. WHITE and JOYE A. WHITE, individually and doing business as TULSA SUZUKI, INC., Defendants.	)	

O R D E R

Upon joint application of the parties, the above styled case is hereby dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED, this 26 day of February, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., a corporation,

Plaintiff,

vs.

THEODORE J. SUDAL, JOSEPH J. SUDAL and T. J. S. VEHICLE RENTAL & LEASING, INC., a corporation,

Defendants.

Case No. 88-C-1418C

FILED

FEB 26 1990

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

Now on this 23 day of Feb, 1990, this matter comes on before the undersigned District Judge. Plaintiff, Thrifty Rent-A-Car System, Inc. ("Thrifty") filed its Second Amended Complaint on February 17, 1989. Theodore J. Sudal, Joseph J. Sudal and T.J.S. Vehicle Rental & Leasing, Inc. (collectively the "Defendants") filed their Answers and Counterclaims on April 24, 1989. On February 20, 1990, the Defendants filed a Stipulation of Dismissal with Prejudice whereby their Counterclaims brought in this action were dismissed with prejudice. The parties have agreed to the entry of a judgment as hereinafter set forth:

1. The Court finds that the Court has jurisdiction over the Defendants and that the Defendants consent to the jurisdiction of this Court.

142

2. The Court further finds that every issue of law and fact herein is wholly between citizens of different states and the amount in controversy exceeds $10,000, exclusive of interest and costs. The Court further finds that it has jurisdiction over the subject matter hereof pursuant to 28 U.S.C. § 1332(a).

3. The Court further finds that venue is proper pursuant to 28 U.S.C. ¶ 1391(a).

4. The Court further finds that Thrifty should be granted a joint and several judgment in its favor against the Defendants, Theodore J. Sudal, Joseph J. Sudal and T.J.S. Vehicle Rental & Leasing, Inc., and each of them, on the claims for relief stated in the Second Amended Complaint filed herein on February 17, 1989, in the amount of $65,000.00 as of the date hereof, with interest thereon from and after March 22, 1990 at the rate of 7.97 percent per annum as provided by law, with each party to bear its own costs and fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that a joint and several judgment be and is hereby entered in favor of Thrifty against the Defendants, Theodore J. Sudal, Joseph J. Sudal and T.J.S.. Vehicle Rental & Leasing, Inc., and each of them, on the claims for relief stated in the Second Amended Complaint, in the amount of $65,000.00 as of the date hereof, with interest thereon from

and after March 22, 1990 at the rate of 7.97 percent per annum as provided by law, with each party to bear its own costs and fees.

DISTRICT JUDGE

Approved:

John M. Hickey, OBA #11100
THRIFTY RENT-A-CAR SYSTEM, INC.
Suite 900, 5330 E. 31st St.
Tulsa, Oklahoma 74153
(918)665-9319

Dana L. Rasure, OBA #7421
BAKER, HOSTER, MCSPADDEN, CLARK,
RASURE & SLICKER
800 Kennedy Building
Tulsa, Oklahoma 74103
(918)592-5555

Attorneys for Plaintiff
Thrifty Rent-A-Car System, Inc.

Steven R. Hickman, OBA #4172
FRASIER & FRASIER
1700 Southwest Boulevard, Suite 100
P.O. Box 799
Tulsa, Oklahoma 74101
(918)584-4724

Attorney for the Defendants
Theodore J. Sudal, Joseph J. Sudal
and T.J.S. Vehicle Rental & Leasing, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IDA MAE MEYERS, Plaintiff,	)	
vs.	)	No. 89-C-935-B
ALLSTATE INSURANCE COMPANY, Defendant.	)	

O R D E R

Upon the parties' Stipulation of Dismissal, the Court hereby dismisses the above styled case with prejudice as to its refiling. Each party is to pay its respective costs and attorney fees.

IT IS SO ORDERED, this 26 day of February, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JOHN RUSSELL PENN,

Petitioner,

v.

87-C-829-B

JACK COWLEY and ATTORNEY GENERAL, State of Oklahoma,

Respondents.

ORDER

Petitioner John Russell Penn's Amended Petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (Docket #26)[1] should be granted.

HISTORY

Petitioner is incarcerated in the Joseph Harp Correctional Center in Lexington, Oklahoma. He was jailed pursuant to a judgment and sentence rendered in the District Court of Ottawa County, Case Nos. CRF-79-177 and CRF-79-261. These convictions for Obtaining Merchandise by Bogus Check were affirmed by the Oklahoma Court of Criminal Appeals in Case No. F-81-406. An application for post-conviction relief was denied in the Ottawa County District Court. The Court of Criminal Appeals affirmed the denial in Case No. PC-87-292. A writ of habeas corpus was denied by the Court of Criminal Appeals in Case No. H-87-625.

On October 2, 1987 petitioner filed a federal petition for a writ of habeas corpus, raising ten (10) separate grounds. This

[1] *"Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.*

62

petition was dismissed on May 4, 1988, because petitioner had not exhausted available state remedies on four of the grounds. Petitioner sought permission from the court to amend and resubmit his application after removing the unexhausted claims, and the court granted his Motion to Reconsider and Reopen Habeas Corpus Action on August 10, 1988. Petitioner's Amended Petition containing six separate grounds was filed on August 19, 1988.

PROCEDURAL DEFAULT

Respondents' response to the amended petition (#30) says that the petition should be denied, because petitioner did not raise these claims in his direct appeal of the case and was procedurally barred from raising the issues when he applied to the Oklahoma court for post-conviction relief. They say the remaining claims are procedurally barred in this court under the "cause and prejudice test" of Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977), unless petitioner shows good cause for his procedural default and actual prejudice resulting from the alleged constitutional violations.

In his order of March 29, 1989, the Magistrate noted that the court in Braiser v. Douglas, 815 F.2d 64, 65 (10th Cir. 1987), had seen difficulties in applying a procedural bar where a state has a fundamental error exception to its procedural default rule. In such a situation, a state court can dismiss a claim because of procedural default, only after it considers the merits of the claim to determine whether fundamental error has occurred. The Brasier court had previously concluded that "since the state court

considers the merits of a claim in such a case, the federal habeas court is not precluded from addressing the merits."

The Magistrate then concluded that the State Court of Criminal Appeals impliedly examined the merits of petitioner's claims, because Oklahoma has a fundamental error exception to its procedural default rule. Thus, this court could consider petitioner's claims despite his procedural default in not including them in his direct appeal, provided they constituted fundamental error if shown to be true.

Upon Respondents' objection, the Magistrate reconsidered that order in light of Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, ___ L.Ed.2d ___ (1989). In Harris the Court found that an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "cause and prejudice" or that failure to consider the federal claim will result in a fundamental miscarriage of justice. The claimant's procedural default precludes habeas review if the last state court rendering a judgment "clearly and expressly" states that its judgment rests on a state procedural bar without any express consideration of the merits.

The Oklahoma Court of Criminal Appeals found that petitioner's convictions were affirmed on appeal, and thus all issues previously ruled on were res judicata and all issues not raised in the direct appeal were waived. The state court decision rested on an adequate and independent state law ground. The Magistrate concluded that this court was barred from consideration of four of petitioner's

claims by his failure to include them in his appeal and the Oklahoma Court of Criminal Appeal's express finding of waiver. Unless petitioner can show both cause excusing his procedural default and actual prejudice resulting therefrom, the writ should be denied.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Trial Phase

The Supreme Court has held in Kimmelman v. Morris, 477 U.S. 365 (1986), that an ineffective assistance of counsel claim may be brought for the first time collaterally. Therefore, petitioner's procedural default does not preclude review on this ground. Further, if petitioner establishes that he received ineffective assistance from his attorney, he may be able to show cause excusing his procedural default at the state level and actual prejudice resulting therefrom. In such event, this court could also consider his otherwise procedurally barred claims. Respondents were ordered to advise the court whether petitioner's claim of ineffective assistance of counsel stated a violation of his constitutional rights. The court now has reviewed petitioner's claim and respondents' response.

Petitioner claims that he was denied his Sixth Amendment right to effective assistance of counsel by his lawyer's failure to preserve error at trial, and his failure to raise five issues on appeal.[2] Petitioner delineates these five issues as follows:

[2] *Petitioner's counsel raised only three issues on appeal. These included: 1) insufficiency of the evidence, 2) alleged error in allowing evidence of other crimes (other insufficient funds checks), and 3) prejudice from inflammatory prosecutorial comments.*

1. A claim that his Fifth Amendment rights against self-incrimination were denied where the state trial court would not instruct the jury that petitioner's decision not to testify should not be taken into consideration in arriving at a verdict.[3]

2. A claim that he was denied effective assistance of counsel at trial because he could not have the instruction complained of in issue 1.

3. A claim that it was improper for the judge to allow his admission of three prior felonies, rather than require the state to prove such by extrinsic evidence.

4. A claim that petitioner was sentenced under the wrong sentencing statute.

5. A claim that the jury should have been instructed on concurrent sentencing.

The Supreme Court set forth standards by which to judge ineffective assistance of counsel claims in Strickland v. Washington, 466 U.S. 668 (1984). To establish a claim that counsel's assistance was so defective as to require a reversal of conviction, a petitioner must show first, that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense. The petitioner must establish that counsel's errors were so serious as to deprive the defendant of a fair trial. It must be established that counsel's assistance was unreasonable considering all the circumstances. The Supreme Court in Strickland stated that the bottom line for judging any claim of ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that

[3] *Petitioner asserts that he was "compelled" to take the stand and incriminate himself by virtue of the trial court's refusal to give such an instruction.*

the trial cannot be relied on as having produced a just result." 466 U.S. at 686. The Court recognized that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. The Strickland standards have consistently been followed by the Tenth Circuit. Hannon v. Maschner, 845 F.2d 1553 (10th Cir. 1988); United States v. Espinosa, 771 F.2d 1382, 1411 (10th Cir. 1985). Attorney error short of ineffective assistance of counsel does not constitute "cause" for a procedural default. Murray v. Carrier, 477 U.S. 478 (1976).

Petitioner was convicted of passing two checks that were returned due to insufficient funds. His defense was that he had deposited a $500.00 check which would have covered the outstanding checks, except for the fact that the deposit was not credited because the maker had stopped payment. The jury did not accept that defense. The evidence strongly supported the jury's verdict that Petitioner was guilty of the crimes charged and petitioner does not now allege that he is innocent of the charges. He claims that without the alleged deficiencies of counsel, the jury would have concluded differently.

On this record, the court cannot conclude that there is a reasonable probability that the alleged errors at trial would have altered the jury's verdict.

Issue "1" concerning an instruction for failure to testify was raised by petitioner's counsel at the trial in this matter and thus

preserved for appeal. Instructions are given by the court, not counsel. Having preserved the alleged error, it cannot be said that counsel was ineffective at trial because no instruction was given.[4]

The decision to then have petitioner testify was a strategic judgment call. Both testifying and the failure of petitioner to testify involved strategic risk. The decision to have petitioner take the stand does not constitute deficient performance of counsel, but the contemporaneous exercise of professional judgment that should not now be second-guessed on a cold record with the benefit of hindsight. Once the decision was made to have petitioner testify, it was appropriate for the trial judge to allow inquiry into his prior felony record. Fed.R.Evid. 609.

The Sentencing Phase

The court finds that petitioner has met his burden of showing prejudice as a result of counsel's deficient performance during the sentencing phase of the trial. Petitioner has shown that he was sentenced by the jury under an incorrect statute. The crimes which petitioner committed took place in September of 1978. However, petitioner was sentenced under an amended section of the Habitual Criminal Act (21 O.S. §51(b)) that became effective October 1,

---

[4] *The court notes that the law has undergone a change since petitioner's trial. Petitioner's trial took place in July, 1979. At that time Oklahoma law prohibited the trial court from making any mention of the defendant's failure to testify. See Ellis v. State, 558 P.2d 1191 (Okla.Crim.App. 1977); Villines v. State, 492 P.2d 343 (Okla. Crim.App. 1971).*

In March of 1981 the United States Supreme Court held that upon proper request a state trial judge is constitutionally obligated to instruct the jury that it is not to draw any inference from the fact that a defendant has failed to testify. See Carter v. Kentucky, 450 U.S. 288 (1981). The Court, however, did not hold that the ruling in Carter was retroactive. The Oklahoma Court of Criminal Appeals has held that the decision in Carter is to be applied prospectively only. See Mack v. State, 641 P.2d 1122, 1124 (Okla.Crim.App. 1982). Thus, defense counsel's failure to raise this issue on appeal in 1983 does not constitute ineffective assistance of counsel.

1978. The previous subsection (b) of § 51 was declared unconstitutional by the Court of Criminal Appeals in Thigpen v. State, 571 P.2d 467 (Okla. Crim. App. 1977). Therefore, the only section that was applicable to petitioner at the time of his crimes was subsection "A" of § 51 allowing the jury to impose a minimum sentence of ten (10) years.[5]

Nevertheless, the court erroneously instructed the jury that the minimum sentence they could impose on petitioner was twenty (20) years per 21 O.S. Supp. 1988 § 51(b), and petitioner's counsel did not object to this instruction.[6]

---

[5] *21 O.S. 51(A) reads in pertinent part:*

A. Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

[6] *The petitioner was sentenced to 20 years imprisonment in Case No. CRF-79-177, and to 20 years imprisonment in Case No. CRF-79-261, pursuant to jury verdict. At least one juror would have fixed a lesser sentence if he had been properly instructed:*

THE COURT: *Ladies and gentlemen, is this a unanimous verdict?*

JURY: *Yes, sir.*

THE COURT: *The verdict form would so indicate. Anybody here that did not vote in favor of this verdict?*

JUROR: *I voted for less years.*

THE COURT: *Well, the verdict is signed by the foreman and that indicates under the law that it was a unanimous verdict.*

JUROR: *I agreed with the verdict. I disagreed with the penalty but I can't do anything about that.*

THE COURT: *Well, you have indicated by returning a verdict in here this afternoon on the punishment that you agreed with the second phase of this hearing.*

MR. BROWN: *Your Honor, what is the gentleman's name?*

THE COURT: *I'm sorry. Mr. Lee, is it?*

Petitioner was sentenced on August 3, 1979. On June 16, 1980, the Supreme Court decided the case of Hicks v. Oklahoma, 447 U.S. 343, which was factually very similar to petitioner's case. Hicks had been sentenced under the statute later declared unconstitutional in Thigpen. In an unpublished opinion, the Oklahoma Court of Criminal Appeals acknowledged that the law was unconstitutional, but nonetheless affirmed Hicks' sentence,

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JUROR: Cox.

THE COURT: Cox?

JUROR: Yes.

THE COURT: You understand, Mr. Cox, that under the instructions given to you by the Court that it instructed the jury, when they went out to determine the punishment, and that it would have to be a unanimous verdict and it would be signed by the foreman. And now you are indicating to the Court that that wasn't your intentions?

JUROR: No, sir. No, sir. What I am saying is, I agreed with the verdict. But then the law says 20 years for that and --

THE COURT: -- That is the minimum punishment --

JUROR: -- Yes, sir.

THE COURT: -- for a conviction after two or more previous felony convictions.

JUROR: Yes, sir.

THE COURT: You concurred with that; is that correct?

JUROR: I concurred with it. I thought it was a little too much.

THE COURT: I have nothing further. Mr. Brown?

MR. BROWN: Show our exception, Your Honor.

THE COURT: You may have an exception. Ladies and gentlemen -- Does the State have anything that they would like to add at this point?

MR. BARTON: Your Honor, I take it that this juror agrees with the other jurors that that is the fact, he just doesn't concur or agree with the law; is that correct?

THE COURT: That's my understanding. Would that be a correct statement, Mr. Cox?

JUROR: Yes. yes.

THE COURT: All right, sir.

Transcript of proceedings conducted on July 11-12, 1979 in Case Nos. CRF-79-177 and CRF-79-261, in the District Court of Ottawa County, State of Oklahoma, pp. 120-121.

reasoning that he was not prejudiced by the impact of the invalid statute because his sentence was within the range of punishment that could have been imposed.

The Supreme Court vacated the unpublished decision, saying Hicks had been deprived of his liberty without due process of law. Mr. Justice Stewart authored the opinion of the Court. He reasoned that if the jury had been properly instructed, there was a substantial possibility that Hicks would have received a sentence much less than the one he received. The Supreme Court found that under state practice a defendant's right to have a jury fix his sentence in the first instance was determinative as a practical matter of the maximum sentence a defendant would receive.

Petitioner's counsel failed to raise the matter of the improper sentencing on appeal even though this opportunity was presented in 1983, long after the United States Supreme Court's 1980 decision in Hicks.[7] Respondents concede on page 7 of their response that petitioner's allegation of ineffective assistance of counsel in this case "is a close call".

The court finds that deficient performance by counsel and resulting prejudice have been shown in the sentencing phase of petitioner's trial and on appeal. It is unnecessary to examine petitioner's other claims of error during the sentencing stage of the trial, as he has shown cause excusing his procedural default at the state level and actual prejudice resulting therefrom.

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[7] *Respondents admit that this timing weakens their argument that the failure to raise a Hick's argument on appeal did not constitute ineffective assistance of counsel. See Response (Docket No. 54), at 7, n.8.*

Under 28 U.S.C. § 2243, the court, having determined the facts, must "dispose of the matter as law and justice require". Of course, the federal habeas corpus statute grants a federal court power to grant, as relief, immediate release from custody. The Supreme Court has observed that the habeas corpus statute also contemplates the possibility of relief in addition to immediate release. Carafas v. LaVallee, 391 U.S. 234, 239 (1968). In granting habeas relief some courts have ordered the petitioner released unless within a limited time the state proceeds to retry the petitioner. Alim v. Smith, 474 F.Supp. 54, 63 (W.D.N.Y. 1979). Courts have also ordered release unless a re-sentencing occurs. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Therefore it is Ordered that Petitioner be released from the custody of respondents, unless the State of Oklahoma within sixty (60) days of the filing of this order retries and resentences petitioner pursuant to a properly instructed jury's verdict. Alternatively, the State of Oklahoma may avoid the release of petitioner if he is judicially resentenced to the minimum such a jury could impose, i.e. to a term of imprisonment of 10 years in Case No. CRF-79-177 and of 10 years in Case No. CRF-79-261.[8]

Dated this 26th day of Feb., 1990.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[8] *The court recognizes that it is within the discretion of the state trial judge whether or not petitioner's sentences are run consecutively or concurrently. Lloyd v. State, 654 P.2d 645, 647 (Oklahoma Criminal Appeals 1982).*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re: HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	M.D.L. 153 73-C-175 74-C-151 74-C-179 74-C-181 74-C-231 74-C-232 75-C-434 74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:

Bernard Broeker
Francis Broeker
Beatrice B. Warren

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:

Judson Streicher
Estate of Joseph Streicher
Estate of Ethel Streicher
Saint Agnes Hospital
Diabetes Trust Fund
J. Streicher & Com.

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Robert S. Trippet

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

E. M. Kunkel
Philip A. Chenoweth & Assoc.

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:	Defendants:
Leland Leachman James Leachman Lester Leachman Jerrold Wexler Robert Wexler	Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:	Defendants:
W.H. Dennler	Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:	Defendants:
J.A. Buda L.L. Ferguson R. Hart M.F. Kent B.M. Robertson	Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:	Defendants:
Chase Manhattan Bank, N.A. and Verna Sabelle, Executors Computech Arbitrage Partnership B.A. Parkhurst	Robert S. Trippet Estate of Norman C. Cross, Jr. E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 26 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

In Re:	M.D.L. 153
HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	73-C-175 74-C-151 74-C-179 74-C-181 74-C-231 74-C-232 74-C-434 74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

3798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:

Bernard Broeker
Francis Broeker
Beatrice B. Warren

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:

Judson Streicher
Estate of Joseph Streicher
Estate of Ethel Streicher
Saint Agnes Hospital
Diabetes Trust Fund
J. Streicher & Com.

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Robert S. Trippet

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

E. M. Kunkel
Philip A. Chenoweth & Assoc.

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:

W.H. Dennler

Defendants:

Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:

J.A. Buda
L.L. Ferguson
R. Hart
M.F. Kent
B.M. Robertson

Defendants:

Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:

Chase Manhattan Bank, N.A. and
Verna Sabelle, Executors
Computech Arbitrage Partnership
B.A. Parkhurst

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 26 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

In Re:	M.D.L. 153	
HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	73-C-175	74-C-151
	74-C-179	74-C-181
	74-C-231	74-C-232
	74-C-434	74-C-344 & 73-C-409
		Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

2798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:

Bernard Broeker
Francis Broeker
Beatrice B. Warren

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:

Judson Streicher
Estate of Joseph Streicher
Estate of Ethel Streicher
Saint Agnes Hospital
Diabetes Trust Fund
J. Streicher & Com.

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Robert S. Trippet

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

E. M. Kunkel
Philip A. Chenoweth & Assoc.

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:	Defendants:
Leland Leachman James Leachman Lester Leachman Jerrold Wexler Robert Wexler	Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:	Defendants:
W.H. Dennler	Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:	Defendants:
J.A. Buda L.L. Ferguson R. Hart M.F. Kent B.M. Robertson	Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:	Defendants:
Chase Manhattan Bank, N.A. and Verna Sabelle, Executors Computech Arbitrage Partnership B.A. Parkhurst	Robert S. Trippet Estate of Norman C. Cross, Jr. E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 26 1990 A

Jack C. Silver, Clerk
U. S. DISTRICT COURT

In Re:	M.D.L. 153	
HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	73-C-175	74-C-151
	74-C-179	74-C-181
	74-C-231	74-C-232
	74-C-434	74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:

Bernard Broeker
Francis Broeker
Beatrice B. Warren

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:

Judson Streicher
Estate of Joseph Streicher
Estate of Ethel Streicher
Saint Agnes Hospital
Diabetes Trust Fund
J. Streicher & Com.

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Robert S. Trippet

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

E. M. Kunkel
Philip A. Chenoweth & Assoc.

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:	Defendants:
Leland Leachman James Leachman Lester Leachman Jerrold Wexler Robert Wexler	Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:	Defendants:
W.H. Dennler	Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:	Defendants:
J.A. Buda L.L. Ferguson R. Hart M.F. Kent B.M. Robertson	Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:	Defendants:
Chase Manhattan Bank, N.A. and Verna Sabelle, Executors Computech Arbitrage Partnership B.A. Parkhurst	Robert S. Trippet Estate of Norman C. Cross, Jr. E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 26 1990 A

Jack C. Silver, Clerk
U. S. DISTRICT COURT

In Re: HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	M.D.L. 153 73-C-175 74-C-151 74-C-179 74-C-181 74-C-231 74-C-232 74-C-434 74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

1798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:

Bernard Broeker
Francis Broeker
Beatrice B. Warren

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:

Judson Streicher
Estate of Joseph Streicher
Estate of Ethel Streicher
Saint Agnes Hospital
Diabetes Trust Fund
J. Streicher & Com.

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Robert S. Trippet

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

E. M. Kunkel
Philip A. Chenoweth & Assoc.

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:

W.H. Dennler

Defendants:

Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:

J.A. Buda
L.L. Ferguson
R. Hart
M.F. Kent
B.M. Robertson

Defendants:

Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:

Chase Manhattan Bank, N.A. and
Verna Sabelle, Executors
Computech Arbitrage Partnership
B.A. Parkhurst

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 26 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

In Re:	M.D.L. 153	
HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	73-C-175	74-C-151
	74-C-179	74-C-181
	74-C-231	74-C-232
	74-C-434	74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

2798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:	Defendants:
Bernard Broeker	Robert S. Trippet
Francis Broeker	Estate of Norman C. Cross, Jr.
Beatrice B. Warren	E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:	Defendants:
Judson Streicher	Robert S. Trippet
Estate of Joseph Streicher	Estate of Norman C. Cross, Jr.
Estate of Ethel Streicher	E.M. Kunkel
Saint Agnes Hospital	
Diabetes Trust Fund	
J. Streicher & Com.	

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:	Defendants:
Leland Leachman	Robert S. Trippet
James Leachman	
Lester Leachman	
Jerrold Wexler	
Robert Wexler	

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:	Defendants:
Leland Leachman	E. M. Kunkel
James Leachman	Philip A. Chenoweth & Assoc.
Lester Leachman	
Jerrold Wexler	
Robert Wexler	

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:

W.H. Dennler

Defendants:

Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:

J.A. Buda
L.L. Ferguson
R. Hart
M.F. Kent
B.M. Robertson

Defendants:

Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:

Chase Manhattan Bank, N.A. and
Verna Sabelle, Executors
Computech Arbitrage Partnership
B.A. Parkhurst

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 26 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

In Re:	M.D.L. 153	
HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	73-C-175	74-C-151
	74-C-179	74-C-181
	74-C-231	74-C-232
	74-C-434	74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

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Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:

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Francis Broeker
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Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:

Judson Streicher
Estate of Joseph Streicher
Estate of Ethel Streicher
Saint Agnes Hospital
Diabetes Trust Fund
J. Streicher & Com.

Defendants:

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Estate of Norman C. Cross, Jr.
E.M. Kunkel

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:

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Jerrold Wexler
Robert Wexler

Defendants:

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Lester Leachman
Jerrold Wexler
Robert Wexler

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Philip A. Chenoweth & Assoc.

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James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:

W.H. Dennler

Defendants:

Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:

J.A. Buda
L.L. Ferguson
R. Hart
M.F. Kent
B.M. Robertson

Defendants:

Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:

Chase Manhattan Bank, N.A. and
Verna Sabelle, Executors
Computech Arbitrage Partnership
B.A. Parkhurst

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 26 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

In Re:	M.D.L. 153	
HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	73-C-175	74-C-151
	74-C-179	74-C-181
	74-C-231	74-C-232
	74-C-434	74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

2798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:	Defendants:
Bernard Broeker Francis Broeker Beatrice B. Warren	Robert S. Trippet Estate of Norman C. Cross, Jr. E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:	Defendants:
Judson Streicher Estate of Joseph Streicher Estate of Ethel Streicher Saint Agnes Hospital Diabetes Trust Fund J. Streicher & Com.	Robert S. Trippet Estate of Norman C. Cross, Jr. E.M. Kunkel

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:	Defendants:
Leland Leachman James Leachman Lester Leachman Jerrold Wexler Robert Wexler	Robert S. Trippet

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:	Defendants:
Leland Leachman James Leachman Lester Leachman Jerrold Wexler Robert Wexler	E. M. Kunkel Philip A. Chenoweth & Assoc.

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:	Defendants:
Leland Leachman James Leachman Lester Leachman Jerrold Wexler Robert Wexler	Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:	Defendants:
W.H. Dennler	Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:	Defendants:
J.A. Buda L.L. Ferguson R. Hart M.F. Kent B.M. Robertson	Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:	Defendants:
Chase Manhattan Bank, N.A. and Verna Sabelle, Executors Computech Arbitrage Partnership B.A. Parkhurst	Robert S. Trippet Estate of Norman C. Cross, Jr. E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEB 26 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

In Re:	M.D.L. 153	
HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION	73-C-175	74-C-151
	74-C-179	74-C-181
	74-C-231	74-C-232
	74-C-434	74-C-344 & 73-C-409, Consolidated

FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Pursuant to oral announcements by Plaintiffs at the trial of these consolidated actions withdrawing certain claims asserted in individual actions from consideration by the jury and upon oral motion by Plaintiffs at the hearing on February 26, 1990, judgment is hereby entered dismissing, without prejudice and without costs, all claims against those defendants named in the cases listed on Exhibit A attached to this Final Judgment.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in the entry of these final judgments and the Clerk is expressly directed to enter judgment forthwith as set forth herein.

Dated:

UNITED STATES DISTRICT JUDGE

Judgment entered:

CLERK OF THE COURT

3798

EXHIBIT A
TO
FINAL JUDGMENT
DISMISSING CLAIMS IN INDIVIDUAL CASES

Broeker et al. v. Home-Stake Production Co., et al., No. 74-C-181

Plaintiffs:

Bernard Broeker
Francis Broeker
Beatrice B. Warren

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E. M. Kunkel

Streicher et al. v. Home-Stake Production Company, et al., No. 73-C-175

Plaintiffs:

Judson Streicher
Estate of Joseph Streicher
Estate of Ethel Streicher
Saint Agnes Hospital
Diabetes Trust Fund
J. Streicher & Com.

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

Leachman et al. v. Home-Stake Production Company, et al., No. 73-C-344, and Wexler v. Home-Stake Production Company, et al., No. 73-C-409, Consolidated

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Robert S. Trippet

Leachman, et al. v. Fitzgerald, et al., No. 74-C-232

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

E. M. Kunkel
Philip A. Chenoweth & Assoc.

Leachman, et al. v. Norman C. Cross, Jr., et al., No. 74-C-179

Plaintiffs:

Leland Leachman
James Leachman
Lester Leachman
Jerrold Wexler
Robert Wexler

Defendants:

Estate of Norman C. Cross, Jr.

Acker, et al. v. Home-Stake Production Company, et al., 74-C-231

Plaintiffs:

W.H. Dennler

Defendants:

Estate of Norman C. Cross, Jr.

Buda, et al. v. Home-Stake Production Company, et al., 75-C-434

Plaintiffs:

J.A. Buda
L.L. Ferguson
R. Hart
M.F. Kent
B.M. Robertson

Defendants:

Robert S. Trippet

The Chase Manhattan Bank, N.A., et al. v. Home-Stake Production Company, et al., 74-C-151

Plaintiffs:

Chase Manhattan Bank, N.A. and
Verna Sabelle, Executors
Computech Arbitrage Partnership
B.A. Parkhurst

Defendants:

Robert S. Trippet
Estate of Norman C. Cross, Jr.
E.M. Kunkel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEFFREY LEE MUSICK and SHERRI DEE (MUSICK) MAYO,	)	
Plaintiffs,	)	
vs.	)	Case No. 88-C-1348-C
FRONTIER FEDERAL SAVINGS & LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, the parties hereby stipulate that the above-styled action is to be dismissed without prejudice as to the Federal Savings and Loan Insurance Corporation, as Receiver for Frontier Federal Savings and Loan Association, and its statutory successor, the Federal Deposit Insurance Corporation as Manager of the FSLIC Resolution Fund, as receiver for Frontier Federal Savings and Loan Association, the party defendant to this cause, and that said action is hereby dismissed without prejudice, each party to bear its own cost.

William C. Chevaillier
MYSOCK & CHEVAILLIER
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Tulsa, Oklahoma 74104

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Tulsa, Oklahoma 74103
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ATTORNEY FOR FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND, AS RECEIVER FOR FRONTIER FEDERAL SAVINGS AND LOAN ASSOCIATION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAYMOND RED CORN, JR., unallotted Osage Indian,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

No. 89-C-672-C

ORDER

Now before the Court for its consideration is the motion of the defendants to dismiss.

Plaintiff, an Osage Indian, brings this action against the United States for an alleged breach of its fiduciary duty under the Act of June 28, 1906. 34 Stat. 539 (1906). He alleges that the Secretary of the Interior gave after-the-fact approval in 1944 to a 1929 void sale by the plaintiff, who was a minor at the time of the alleged void sale and a restricted adult Indian at the time of the after-the-fact approval. Defendants move for dismissal on multiple grounds, the first being that this Court lacks subject matter jurisdiction.

Plaintiff argues that jurisdiction rests with this Court pursuant to 25 U.S.C. §345, 28 U.S.C. §1331 and 5 U.S.C. §§701-706. 25 U.S.C. §345 provides federal district courts with jurisdiction over certain suits dealing with Indian allotments. See United

16

States v. Mottaz, 476 U.S. 834 (1986). However, for whatever reason, by the Act of 1906 Congress repealed §345 as to Osage Indians. See United States v. Ickes, 117 F.2d 769, 771-72 (D.C. Cir. 1940), cert. denied, 313 U.S. 575 (1941). In addition, plaintiff in the case at bar seeks only money damages. §345 does not constitute a waiver of sovereign immunity when money damages are sought against the United States absent a showing that the United States gained money from the land. Vicenti v. United States, 470 F.2d 845 (10th Cir. 1972), cert. dism'd, 414 U.S. 1057 (1973). Therefore, this source of jurisdiction is unavailable to plaintiff.

Further, plaintiff seeks money damages in an amount over $10,000. 28 U.S.C. §1346(a)(2) expressly limits the jurisdiction of district courts in such cases to claims "not exceeding $10,000 in amount". See Coleman v. United States Bureau of Indian Affairs, 715 F.2d 1156, 1162 (7th Cir. 1983). Accordingly, the proper forum for this claim is the United States Claims Court. See 28 U.S.C. §1505. Moreover, 28 U.S.C. §1331 does not give district courts jurisdiction of a suit that must be brought exclusively in the Court of Claims. Alamo Navajo School Bd. Inc., v. Andrus, 664 F.2d 229, 233 (10th Cir. 1981).

Plaintiff's contention that subject matter jurisdiction may be based upon the Administrative Procedure Act, 5 U.SC. §§701-706, must also fail. The Act is not an independent grant of federal

jurisdiction. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980) (en banc) aff'd, 455 U.S. 130 (1982).

Finally, defendants contend that the plaintiff's claim is barred by statute of limitation. 28 U.S.C. §2401(a) provides:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

Inasmuch as the alleged breach of duty took place in 1944, defendants argue that the action is time-barred. Plaintiff points to Manchester Band of Pomo Indians, Inc. v. United States, 363 F.Supp. 1238 (N.D.Cal. 1973), which stated that the statute does not begin to run until there is an explicit repudiation of the trust relationship. This Court finds better reasoned such decisions as Capoeman v. United States, 440 F.2d 1002 (Ct.Cl. 1971), which held that the rule did not apply to Indians who were suing on claims that the Government has never acknowledged on the merits. Id. at 1003. Such is the case here. Plaintiff also asserts that the fact that he does not have a certificate of competency constitutes a legal disability under 28 U.S.C. §2401(a). The Capoeman court correctly noted that "incompetent" can be used as a term of art in Indian law to mean that an Indian is prohibited from alienating some or all of his real property. 440 F.2d at 1004-1005. No decision known to this Court has held that such constitutes a "legal disability", such as mental incompetence,

which would toll a statute of limitations. For all the reasons recited above, the Court finds defendants' motion to be well taken.

It is the Order of the Court that the motion of the defendants to dismiss is hereby GRANTED.

IT IS SO ORDERED this 26th day of February, 1990.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED entered

FEB 26 1990

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

CANPET MARKETING LTD., a Canadian corporation,

Plaintiff,

vs.

THOMAS L. HAMMOND, an individual d/b/a THOMAS L. HAMMOND COMPANY,

Defendant.

No. 89-C-285-C

ORDER

Before the Court is the motion of the plaintiff for partial summary judgment. This action arises out of an alleged agreement for plaintiff to sell propane to defendant. Plaintiff brings four causes of action, the first being for breach of contract. The present motion seeks judgment as to the first cause of action.

The Court must determine whether, viewed in the light most favorable to the non-moving party, a material question of fact exists. See McKenzie v. Mercy Hosp., 854 F.2d 365, 367 (10th Cir. 1988). Where a question of material fact exists, summary judgment is inappropriate. Id.

Both parties have submitted affidavits which are diametrically opposed as to contract formation. Plaintiff characterizes defendant's affidavit as "inconsistent" and in part "pure fabrication". However, this Court is simply unable to make such a determination from the record before it. "Trial by affidavit"

26

cannot be used to resolve bona fide issues of fact. Martinez v. Chavez, 574 F.2d 1043, 1045 n.1 (10th Cir. 1978).

It is the Order of the Court that the motion of the plaintiff for partial summary judgment is hereby DENIED.

IT IS SO ORDERED this 26th day of February, 1990.

H. DALE COOK
Chief Judge, U. S. District Court

Entered

FILED

FEB 26 1990

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FERNAND PAYETTE,

Plaintiff,

vs.

THE TULSA CLUB and KEVIN O'DONNELL,

Defendants.

No. 89-C-508-C

ORDER

Before the Court is the renewed motion of the defendants to dismiss plaintiff's first cause of action.

Plaintiff initially alleged four causes of action: (1) discharge in violation of 25 O.S. §1601(1); (2) discharge in violation of 29 U.S.C. §215(a)(3); (3) breach of contract; (4) violation of Fair Labor Standards Act.

Defendants moved to dismiss the first three causes of action. On August 14, 1989, the Court entered an Order sustaining the motion as to the third cause of action. As to the first two, the Court held that the public policy exception to the employment-at-will rule announced in Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989) was unavailable when a remedy was already extant. However, under the mandate of Rule 8(f) F.R.Cv.P., the Court viewed the first two causes of action as alleging violations of the cited

32

statutes themselves. The Court gave defendants leave to renew their motion, which defendants have done regarding the first cause of action.

Before addressing the merits of the motion, the Court must raise another issue. Subsequent to this Court's August 14, 1989 Order the Supreme Court of Oklahoma rendered its decision in Todd v. Frank's Tong Service, Inc., 784 P.2d 47 (Okla. 1989). The Court asked the parties to file briefs as to the implications, if any, of the decision and the parties complied. In Todd, a truck driver alleged a wrongful discharge tort for termination in violation of public policy. Previously, he had filed a complaint with the Secretary of Labor alleging that his discharge violated 49 U.S.C. App. §2305, a provision of the Surface Transportation Assistance Act (STAA). This section provides for reinstatement and compensatory damages. However, as best this Court can determine, the plaintiff's First Amended Petition in Todd did not set forth §2305 as the expression of public policy violated, but rather 47 O.S. §§12-201 et seq., which are state statutes regarding lighting equipment and brakes on motor vehicles. 784 P.2d at 50. These statutes do not provide a remedy if one is discharged for refusing to operate a motor vehicle with defective equipment.

The issue, as framed by the court, was whether the STAA preempted the Burk claim. 784 P.2d at 48. Utilizing traditional preemption analysis, the court ruled that it did not.

It appears that the defendant in Todd failed to raise the issue, not of federal preemption, but of the previous existence of a remedy for violation of the asserted public policy. See, e.g., Allen v. Safeway Stores, Inc., 699 P.2d 277, 284 (Wyo. 1985). Resolving that issue under the facts in Todd would have required a determination of whether 49 U.S.C. App. §2305 would always be an available and proper remedy for one allegedly discharged for refusing to operate a motor vehicle equipped in violation of 47 O.S. §§12-201, et seq. The court in Todd did not make such a determination and therefore left the question open. After careful consideration, the Court has concluded that it will not disturb its previous ruling that the public policy exception is unavailable to plaintiff in the case at bar.

Now the Court turns to the pending motion. The plaintiff's first cause of action, as read by the Court, alleges a violation of 25 O.S. §1601(1). That section provides:

> It is a discriminatory practice for a person, or for two or more persons to conspire,
>
> (1) to retaliate or discriminate against a person because he has opposed a discriminatory practice, or because he has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act;

Plaintiff alleges that on March 20, 1989 he made a charge against the Tulsa Club which stated that the Tulsa Club was demanding that plaintiff work in excess of 200 hours a month when such was detrimental to plaintiff's health. Plaintiff alleges that his discharge on April 26, 1989 was in retaliation for making the charge. Assuming the truth of the allegations, as the Court must

in considering a 12(b)(6) motion, the question is whether the Oklahoma Fair Employment Practices Act provides a remedy. 25 O.S. §1502 requires the filing of a complaint with the Oklahoma Human Rights Commission. The Commission may seek temporary injunctive relief under 25 O.S. §1502.1 and may seek to mediate the dispute. 25 O.S. §1503(a). The Commission may issue a cease and desist order and award affirmative relief. 25 O.S. §1505(b) and (c). The Commission is also authorized to petition in state district court for enforcement of Commission orders. 25 O.S. §§1505(e) and 1506. Plaintiff has cited no authority holding that the Act provides a private cause of action which may be undertaken outside the Commission.

The parties dispute whether plaintiff has in fact filed a complaint with the Commission. Plaintiff has attached certain documents to his pleadings which he asserts constitute a complaint. Defendant characterizes the documents as "an intake questionnaire and an affidavit". (Defendant's September 21, 1989 Reply Brief at 4 n.1). This issue need not be resolved, because plaintiff has made no showing that he has exhausted his administrative remedies. Such exhaustion would necessarily be required before a private action could be brought, even if one were available. Cf. Brogan v. Wiggins School District, 588 F.2d 409, 411 (10th Cir. 1978). The Court has concluded that defendants' motion is well taken.

It is the Order of the Court that the motion of the defendants to dismiss plaintiff's first cause of action is hereby granted. Plaintiff's second and fourth causes of action remain pending.

IT IS SO ORDERED this 26th day of February, 1990.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 26 1990

Jack C. Silver, Clerk
U.S. DISTRICT COURT

RANDALL WADE HAMLIN, a minor by and through his parents, ROLAND and EDITH HAMLIN,	)	
Plaintiff,	)	
v.	)	90-C-29-B ✓
COPAN PUBLIC SCHOOLS, et al,	)	
Defendants.	)	

ORDER DISMISSING CASE WITH PREJUDICE PER THE DISMISSAL WITH PREJUDICE

Upon consideration of the Dismissal with Prejudice filed by the Plaintiff, the Court finds that the foregoing case should be dismissed with prejudice, having been settled.

SO ORDERED THIS 26 day of February, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

13

FILED Entered

FEB 26 1990

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC. (NAACP), through its Tulsa, Oklahoma Branch, et al.,

Plaintiffs,

vs.

CHARLES E. CHRISTOPHER, et al.,

Intervening Plaintiffs,

vs.

CITY OF TULSA, OKLAHOMA, et al.,

Defendants.

No. 87-C-542-C

ORDER

This matter came on for hearing on July 25, July 26, and August 29, 1989 on the applications of plaintiffs and of intervening plaintiffs for attorney fees. The Court now enters its Order in regard thereto.

Plaintiffs brought this action on July 1, 1987 alleging that the at-large system for electing members of the Tulsa City Commission violated the Voting Rights Act of 1965, 42 U.S.C. §1973 et seq. On February 14, 1989, the voters of the City of Tulsa passed a charter change amendment which altered the city government in essentially the manner sought by plaintiffs' Complaint.

80

Plaintiffs and intervenors seek fees pursuant to 42 U.S.C. §19731(3) which states:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

If the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit the plaintiff has crossed the threshold to a fee award of some kind. Texas State Teachers v. Garland Indep. School D., 109 S.Ct. 1486, 1493 (1989).

Plaintiffs seek attorney fees of $199,862.00 and expenses of $40,532.99 for a total of $240,394.99. Intervenors seek $57,003.77.

Prevailing Party

The defendants concede that plaintiffs (as opposed to intervenors) are the prevailing party, despite the fact that the matter did not come to trial. The Tenth Circuit has held that

> the plaintiff's suit need not have been the sole reason for the defendants' action; it is enough that plaintiff's actions were a significant catalyst or a substantial factor in causing defendants to act.
>
> Luethje v. Peavine School Dist., 872 F.2d 352, 354 (10th Cir. 1989).

Defendants contend that the intervenors are not prevailing parties and therefore are not entitled to any attorney fee award. They argue that the intervenors' complaint in intervention, filed 8 days after the NAACP initiated the action, could not have been the catalyst for changing the charter because it was duplicative of the NAACP's Complaint.

The intervenors respond that their "plans in support" for the filing of the lawsuit, their fact gathering and their negotiations "contributed substantially" to the successful conclusion of the case. One court has stated that "intervenors may be considered as prevailing parties entitled to an award of attorneys' fees. But we do not believe Congress intended that such an award be as nearly automatic as it is for a party prevailing in its own right." Donnell v. United States, 682 F.2d 240, 246 (D.C.Cir. 1982), cert. denied, 459 U.S. 1204 (1983). The Court has previously determined, from the evidence presented, that the intervenors are entitled to a reasonable attorney fee under these facts.

The Court's general task is well established:

> First, the Court must ascertain the number of hours reasonably expended on the litigation. Next a reasonable hourly rate is computed. The two figures are then multiplied together to yield an initial estimate of the value of a lawyer's services (also known as the "lodestar"). Lastly, the Court may adjust the lodestar figure upward or downward as may be appropriate in the circumstances.
>
> Central Delaware Branch, NAACP v. City of Dover, 123 F.R.D. 85, 88 (D.Del. 1988). (citations omitted).

The task has been made difficult by the original plaintiffs' time records, which are a disgrace. Handwritten, disorganized, and unedited, they demonstrate little effort to submit a reasonable figure. Of necessity, the Court has relied heavily upon the organizational format devised by defendants. They have set forth four phases of the litigation:

> **(1) Pre-filing Time:** Time expended before the lawsuit and Complaint in Intervention were filed. (May 1987 - July 18, 1987).
>
> **(2) Intervention Time:** Time expended between the time the lawsuit was filed and the time the Intervenors were allowed to enter the case. (July 18, 1987 to January 13, 1988).

(3) **Discovery Time:** Time expended between January 13, 1988, and February 14, 1989.

(4) **Fee Time:** Time expended after February 14, 1989, regarding entitlement to and reasonableness of the submitted fee requests.

(Defendants' October 30, 1989 Brief at 7-8).

Plaintiffs' Request

Dennis Hayes

Hayes seeks 70 hours for the Intervention period. However, time spent opposing intervention is not compensable. United Nuclear Corp. v. Cannon, 564 F.Supp. 581, 585 (D.R.I. 1983). It is undisputed that the principal focus of plaintiffs during this time was opposing intervention. Other recorded hours, which might not deal with intervention, are vaguely recorded simply as "research" or "long distance". This inadequate documentation also makes compensation inappropriate. The Court has concluded that no compensation to Hayes will be made for the Intervention period.

Hayes seeks approximately 419 hours for the discovery period. Defendants have pointed out numerous instances of "double-billing" by Hayes, in which the same entry, e.g., "Research--8 hrs." is made twice in one day, for a total of 16 hours. Due to the vagueness of the entry, it is impossible to tell if this indicates two separate research sessions. However, since on February 9, 1988, Hayes records 28 billable hours, it seems likely that the explanation is otherwise. Hayes has not specifically responded to defendants' objection on this point, and the Court has reduced all double-entered notations, and has deleted altogether such vague entries as "research". Defendants have also objected to much of

Hayes' travel time, arguing that such is not compensable if no billable work is done and that, in any case, it should be compensated at a lower rate. See Major v. Treen, 700 F.Supp. 1422, 1432 (E.D.La. 1988). The Court has subtracted 149 hours for double billing and 94 hours on other grounds, leaving a total of 176 compensable hours for the period. Hayes further seeks 64 hours for the Fee Request period. An award of fees may include compensation work performed in preparing and presenting the fee application. Mares v. Credit Bureau, 801 F.2d 1197, 1205 (10th Cir. 1986). However, plaintiffs stated in one pleading that they desired a hearing on fees, but when the hearing began, Mr. Hayes announced that plaintiffs would stand on their briefs. Defendants should not be required to pay for unnecessary preparation. Further, much of the time recorded involves revising plaintiffs' fee request after defendants pointed out errors therein. The Court will not award fees for work that should have been done properly in the first instance. Hayes will be awarded 30 hours for the Fee Request period.

The defendants have stipulated to Hayes' request for an hourly rate of $150.00. Thus the 206 hours awarded results in a total of $30,900.00.

Hubert Bryant

Bryant seeks fees of 10 hours for the Pre-Filing period. He seeks compensation for such tasks as picking up summons and a cover sheet at the courthouse. Time spent by attorneys on non-legal work is not properly compensable at attorney rates. Laffey v. Northwest

Airlines, Inc., 572 F.Supp. 354, 366 (D.D.C. 1983), aff'd in part, rev. in part on other grounds, 746 F.2d 4 (D.C.Cir. 1984), cert. denied, 472 U.S. 1021 (1985). Bryant also seeks compensation for attending meetings of the local NAACP branch. This "political" time will not be compensated. The Court awards Bryant 4 hours for the Pre-Filing period. Bryant seeks compensation for 82 hours for the Intervention period. Again, much time is directly related to opposing intervention and to attending NAACP meetings. The Court has deleted 45 hours, leaving a total of 37 hours. Bryant seeks 271 hours for the Discovery period. A great deal of this time was recorded when Bryant attended a deposition along with Hayes. It is represented that during most depositions, defendants were represented by one attorney. The Court will not award this unnecessary "double-teaming". Bryant's hours in this area will be reduced to 102. Bryant seeks 40 hours for the Fee Request period. Bryant made no presentation at the hearing itself, and has not demonstrated that his work was anything other than duplicative of Hayes'. These 40 hours are deleted, leaving a total of 143. As for hourly rate, in that Bryant was not plaintiffs' lead counsel, the Court finds his request of $150.00/hr. to be excessive. Defendants have stipulated to a rate of $115.00/hr. and this will be awarded. Bryant's total amount is therefore $16,445.00.

Grover Hankins

Hankins seeks compensation for a total of 39 hours. The Court finds that compensation is sought for travel time, and that other entries are vague or reflect excessive time for the task recorded.

The Court finds 15 hours to be reasonable. Defendants have stipulated to an hourly rate of $150.00, resulting in a total of $2,250.00.

Everald Thompson

Thompson seeks compensation for a total of 42 hours. The 10 hours sought for drafting the Complaint is excessive. It is well known that one impetus for this lawsuit was a similar action against the City of Springfield, Illinois All documents in the Springfield case, including the Complaint, were in the hands of the plaintiffs. With this "Springfield model" as a guide, the amount of time necessary for drafting and strategy could not possibly have been as great as if plaintiffs were breaking new ground. Compensation is also sought for travel time and for many hours of "historical" research. The Court reduces the hours awarded to 23. An hourly rate of $95.00 results in a total of $2,185.00.

Edward A. Hailes, Jr.

Hailes seeks compensation for a total of 39 hours. The Court finds the amount excessive for the tasks performed. A reduction to 12 hours at a rate of $85.00/hr. results in a total of $1,020.00.

Brian J. Carter

Carter seeks compensation for a total of 95.5 hours. Many of his entries are excessive or are vaguely termed "research". His request is hereby reduced to 40 hours at a rate of $75.00/hr. for a total of $3,000.00.

Expenses

Plaintiffs seek an award for expenses in the amount of $40,532.99. Of this, $19,583.00 constitutes travel expenses for lawyers between Baltimore and Tulsa. In Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), the court stated:

> [B]ecause there is no need to employ counsel from outside the area in most cases, we do not think travel expenses for such counsel between their offices and the city in which the litigation is conducted should be reimbursed. Departure from this rule should be made in unusual cases only.
>
> Id. at 559.

The amount of total expenses awarded will therefore be $20,949.72.

Plaintiffs also request an enhancement of fees based upon the case's contingency nature. This request is denied. See Ramos, 713 F.2d at 558.

Intervenors' Request

Because of the number of attorneys involved on behalf of the intervenors, and the fact that much of the requested compensation is for the same task performed by many attorneys, the Court has determined to address the total amount of hours, rather than an attorney-by-attorney breakdown. The Court finds $110/hr. to be a reasonable rate, given the fact that virtually all of the intervenors' attorneys' time was recorded out of court.

In Pre-filing time, intervenors' hours break down as follows:

	Hours
Conferences and Meetings	110
Drafting Complaint	32
Legal Research	24

The Court finds the amount of conference and meeting time to be excessive. 24 hours of this time was spent in a study group

established by City Commissioner Gary Watts and its subcommittees. Testimony indicates that Commissioner Watts believed those involved to be donating their time. The fact that Intervenor attorneys were keeping time records of this activity does not render it compensable. Another 46.5 hours of the conference time were spent in meetings of a group of 14 attorneys discussing the bringing of the lawsuit. The number of attorneys involved was too large, as were the number of conferences. Many of the other conference/meeting hours are insufficiently documented. The Court has determined to reduce the number of claimed hours by half to 55.

32 hours devoted to drafting a complaint in this case is excessive. Considering the existence of the Springfield model, 10 hours is more than enough.

Although the amount of legal research is high, considering the existence of the Springfield case and the Supreme Court's decision in Thornburg v. Gingles, 478 U.S. 30 (1986), the Court does not find it excessive. Therefore, this figure will remain unchanged.

During Intervention time the intervenors seek hours as follows:

	Hours
Conferences	135
Legal Research	16
Court Time	19

For the same reasons recited above, the conference hours are hereby reduced to 70 hours. Legal research time will not be reduced. Because 11.5 of the 19.35 court hours represent six attorneys

attending a status conference, the total amount will be reduced to 11 hours.

For Discovery time, intervenors seek compensation for 23 hours. Pursuant to Judge Brett's Order of January 13, 1988, the NAACP was lead counsel in the litigation, and the intervenors did not participate in the discovery process. However, intervenors were entitled to keep abreast of developments and to confer. The Court does not find 23 hours over a 13 month period to be unreasonable. No reduction is imposed.

For Fee time, intervenors seek compensation for 130 hours. Defendants concede that intervenors are entitled to compensation for time spent establishing intervenors' entitlement to fees. Defendants do protest the number of hours claimed. Further, defendants object to intervenors' request for expert witness fees of $437.50. Absent statutory authorization or express agreement, a party's expert witness fees are recoverable only up to the $30.00-per-day statutory limit applicable to any witness. Chapparal Resources, Inc. v. Monsanto Co., 849 F.2d 1286, 1292 (10th Cir. 1988). It appears that the witness in question was used for four days; therefore, $120.00 will be awarded.

As for the number of hours, intervenors assert that the City refused to discuss a reasonable amount and misrepresented the figure which would be submitted to the Court (September 12, 1989 supplemental brief at 7). These statements are not borne out by the record. At least some of the time spent was surely caused by

unnecessary quarreling. The Court reduces the amount sought to 100 hours.

It is the Order of the Court that plaintiffs are hereby awarded attorney fees in the amount of $55,800.00 plus expenses in the amount of $20,949.72 for a total award of $76,749.72 and the intervenors are awarded attorney fees in the amount of $38,152.50 plus expenses in the amount of $615.16 for a total award of $38,767.66.

IT IS SO ORDERED this 26th day of February, 1990.

H. DALE COOK
Chief Judge, U. S. District Court

entered copy

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 26 1990

Jack C. Silver, Clerk
U. S. DISTRICT COURT

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for FIRST NATIONAL BANK & TRUST COMPANY, CUSHING, OKLAHOMA,	)	
Plaintiff,	)	
v.	)	Case No. 90-C0039 B
ASBESTOS DISPOSAL SERVICES, INC., an Oklahoma corporation; REX RUDY, a/k/a REX R. RUDY, an individual; REX RUDY, d/b/a ASBESTOS DISPOSAL SERVICE; REX RUDY II, an individual; BONNIE RUDY, a/k/a BONNIE L. RUDY, an individual; FEDERAL NATIONAL MORTGAGE ASSOCIATION; AMERICAN FLORAL SERVICES, INC.; FOUNDERS BANK & TRUST COMPANY; UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE DIVISION; STATE OF OKLAHOMA, OKLAHOMA TAX COMMISSION,	)	
Defendants.	)	

DISMISSAL OF FEDERAL NATIONAL MORTGAGE ASSOCIATION

COMES NOW the Plaintiff, the Federal Deposit Insurance Corporation, as Receiver for First National Bank & Trust Company, Cushing, Oklahoma ("FDIC"), by and through its attorneys of record, Edwards, Sonders & Propester, and dismisses its cause of action asserted in its Complaint filed January 22, 1990, in the United States District Court for the Northern District of Oklahoma, Case No. 90-C0039-B, insofar and only insofar as said Complaint alleges a claim or cause of action against the Federal National Mortgage Association ("FNMA"). The Dismissal of the allegations presented

901355rm/DPF

against FNMA shall in no way be interpreted to effect the remaining allegations and causes of action presented in FDIC's January 22, 1990 Complaint against any other Defendant.

Respectfully submitted,

Donald P. Fischbach
Of the Firm:
Edwards, Sonders & Propester
Suite 2900, First Oklahoma Tower
210 West Park Avenue
Oklahoma City, OK 73102-5605
Telephone: (405) 239-2121

ATTORNEYS FOR FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST NATIONAL BANK & TRUST COMPANY, CUSHING, OKLAHOMA

CERTIFICATE OF MAILING

This is to certify that on this 23rd day of February, 1990, true and correct copies of the above and foregoing document were mailed, postage prepaid, to:

Allen Mitchell
P.O. Box 190
Sapulpa, Oklahoma 74067

ATTORNEY FOR DEFENDANT, REX RUDY d/b/a ASBESTOS DISPOSAL SERVICE

Phil Pinnell
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103

ATTORNEY FOR DEFENDANT, UNITED STATES OF AMERICA

901355rm/DPF

Carl Bagwell
1000 Robinson Renaissance Bldg.
119 North Robinson
Oklahoma City, Oklahoma 73102

ATTORNEY FOR DEFENDANT, AMERICAN FLORAL SERVICES, INC.

Lisa Haws
Assistant General Counsel
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194-0111

ATTORNEY FOR DEFENDANT, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION

Donald P. Fischbach

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY MOOREHOUSE, Plaintiff, vs. GRAND RIVER DAM AUTHORITY, a government agency of the State of Oklahoma, et al. Defendants.	)	No. 88-C-1529-E

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the plaintiff, LARRY MOOREHOUSE, pursuant to Rule 41 of the Fed.R.Civ.P. and hereby moved to dismiss this action against the defendants, CHARLES McLOUGHLIN and THE STATE OF OKLAHOMA. Neither party has filed an answer in this matter, nor has a Motion for Summary Judgment been filed. Counsel for these defendants has been contacted and he has no objection to this dismissal.

WHEREFORE, PREMISES CONSIDERED, the plaintiff moves that this matter be dismissed without prejudice against the defendants CHARLES McLOUGHLIN and THE STATE OF OKLAHOMA pursuant to Rule 41 of the Fed.R.Civ.P.

Mark D. Lyons

MARK D. LYONS, OBA #5590
LYONS & CLARK
Two Main Plaza
616 South Main, Suite 201
Tulsa, Oklahoma 74119
(918) 599-8844

CERTIFICATE OF MAILING

I, Mark D. Lyons, do hereby certify that I mailed a true and correct copy of the above and foregoing STIPULATION OF DISMISSAL WITHOUT PREJUDICE to: Michael J. Gibbens, Jones Givens, et al. 3800 First National Tower, Tulsa, OK 74103; Guy L. Hurst, 420 W. Main Street, Suite 550, Oklahoma City, OK 73102; and Mr. S.M. Fallis, Jr., 124 E. 4th Street, Suite 400, Tulsa, OK 74103, with proper postage thereon fully prepaid on this 23rd day of February, 1990.

Mark D. Lyons

Mark D. Lyons

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSE E. VALDEZ and THE TRAVELERS INSURANCE COMPANY,

Plaintiffs,

-vs-

THE AJAX MANUFACTURING COMPANY, a Foreign Corporation,

Defendant.

89-C-170-C

FILED

FEB 23 1990

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER AND ENTRY OF JUDGMENT

On the 16th day of February, 1990, there came on for hearing before the undersigned Judge, the Motion of Plaintiff, JOSE E. VALDEZ, to enforce settlement agreement.

Plaintiff JOSE E. VALDEZ appeared personally and by his attorneys, Edwin W. Ash and David P. Reid, Plaintiff TRAVELERS INSURANCE COMPANY appeared through its representative KAREN MANNING and its attorney MARK T. KOSS. Defendant appeared through its attorney WILLIAM F. SMITH.

Having heard the testimony of witnesses sworn and examined in open Court, the parties were instructed to confer with Magistrate John Leo Wagner as to whether the $125,000.00 settlement offer of Defendant was at anytime withdrawn by Defendant during the Settlement Conference on December 13, 1989. Being advised that the Magistrate stated the offer was not withdrawn on that date, and was still open at the close of the Settlement Conference, the Court finds the $125,000.00 offer was still available and accepted by Plaintiffs on December 21, 1989.

24

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that as of this date of the 23rd day of Feb, 1990, judgment is entered in behalf of Plaintiffs JOSE E. VALDEZ and TRAVELERS INSURANCE COMPANY and against Defendant, AJAX MANUFACTURING COMPANY, a Foreign Corporation, in the sum of ONE HUNDRED TWENTY-FIVE THOUSAND AND NO/100 ($125,000.00) DOLLARS plus interest at the rate of 7.79% per annum from this date, until the judgment is paid plus costs.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

EDWIN W. ASH
ATTORNEY FOR PLAINTIFF VALDEZ

MARK T. KOSS
ATTORNEY FOR PLAINTIFF TRAVELERS

WILLIAM F. SMITH
ATTORNEY FOR DEFENDANT AJAX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 22 1990

U.S. DISTRICT COURT

BROKEN ARROW FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

CIGNA INSURANCE COMPANY, a foreign insurance corporation,

Defendant.

No. 89-C-264 B

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Come now the Plaintiff, Broken Arrow Federal Savings and Loan Association, and the Defendant, CIGNA Insurance Company, by their respective counsel, and pursuant to Rule 41 (a)(1)(ii), hereby stipulate that the above-entitled cause be dismissed with prejudice.

Loyal J. Roach, III
Suite 660, Park Centre
525 S. Main
Tulsa, OK 74112

ATTORNEY FOR PLAINTIFF

FELDMAN, HALL, FRANDEN, WOODARD & FARRIS

By
Anthony P. Sutton, OBA #8781
Park Centre - Suite 1400
525 South Main
Tulsa, OK 74103-4409
(918) 583-7129

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

DARREL REEDER,

Plaintiff,

vs. Case No. 88-C-1649-C

CITY OF NOWATA, et al.,

Defendants.

STIPULATION OF DISMISSAL WITH PREJUDICE

All parties to this action hereby stipulate that any and all causes of action and claims against Jim Hay and the City of Nowata are hereby dismissed with prejudice.

Darrel Reeder, Plaintiff

Kevin C. Danielson
Attorneys for Plaintiff

Lewis B. Ambler,
Attorney for Board of County
Commissioners of Nowata County

John H. Lieber
Attorney for Defendants,
City of Nowata and Jim Hay

X.4.16/Reed/Stip/Dis

C-22
5/84

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 20 1990

TOWN & COUNTRY BANK

Plaintiff(s),

vs.

No. 88-C-1583-E

F. LEON BRIMER

Defendant(s).

ADMINISTRATIVE CLOSING ORDER

The Defendant having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 30 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 20th day of February, 1990.

UNITED STATES ~~DISTRICT JUDGE~~ Magistrate

9

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 20 1990

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

JOHN ROUGH,

Plaintiff,

vs.

ROBERT KIMMEL,

Defendant.

No. 89-C-766-C

STIPULATION OF
DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, John Rough, and hereby dismisses Defendant, Richard Kimmel, with prejudice, each party to bear his own cost in the above referenced action.

Respectfully submitted,
John Rough, Plaintiff

BY Daniel B. Gossett

DANIEL B. GOSSETT, OBA 013687
Attorney for Plaintiff

STIPE, GOSSETT, STIPE, HARPER,
ESTES, MCCUNE & PARKS
PO Box 701110
Tulsa, Oklahoma 74170
(918) 745-6084

BY Richard D. Wagner

RICHARD D. WAGNER, OBA 9269

PO Box 1560
Tulsa, Oklahoma 74101-1560
(918) 584-6457

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDALL WADE HAMLIN, A MINOR BY AND THROUGH HIS PARENTS, ROLAND AND EDITH HAMLIN,

Plaintiffs,

vs.

COPAN PUBLIC SCHOOLS, COPAN PUBLIC SCHOOL BOARD OF EDUCATION, RICK BROWER, PRESIDENT OF COPAN PUBLIC SCHOOLS, TERRY BRYAN, VICE PRESIDENT OF COPAN PUBLIC SCHOOLS, JOE A. JETER, CLERK OF COPAN PUBLIC SCHOOLS, JACK MCGLATHERY, MEMBER OF THE COPAN PUBLIC SCHOOLS BOARD OF EDUCATION, STEVE DEAN, MEMBER OF THE COPAN PUBLIC SCHOOLS BOARD OF EDUCATION, HAROLD ROWLAND, PRINCIPAL OF COPAN HIGH SCHOOL AND VAL COLEMAN, ASSISTANT PRINCIPAL OF COPAN HIGH SCHOOL,

Defendants.

CASE NO. 90-C-0029-B

FILED

FEB 16 1990

Jack C. Silver, Clerk
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

Come now the Plaintiff above named, and its their Attorney of Record, Michael A. Abel, and hereby dismisses the above-styled action with prejudice as said Defendants above named.

Dated this _____ day of February, 1990.

Randall Wade Hamlin

Michael A. Abel
Attorney for Plaintiffs
109 North Oak, P.O. Box 756
Nowata, Oklahoma 74048
(918) 273-0084 Bar #10614

approved:
Atty for Defendants

Close as to D's Farmers & Southcoast 2/16/90 Reyna only

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BIZJET INTERNATIONAL SALES & SUPPORT, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 89-C-885-C
MULTISTATE SERVICES, INC., an Oregon corporation; KEITH SMITH, a/k/a H. KEITH SMITH; REYNA FINANCIAL CORPORATION, an Ohio corporation; JET AVIATION ASSOCIATES, LTD.; THE FARMERS & MERCHANTS NATIONAL BANK, a national banking corporation; and SOUTHCOAST BANK CORP., a Florida corporation,	)	
Defendants.	)	

ORDER OF DISMISSAL

Now, on this 16th day of February, 1990, the Court has for its consideration the Stipulation for Dismissals jointly filed in the above styled and numbered cause by plaintiff and defendants Reyna Financial Corporation, Southcoast Bank Corp., and Farmers & Merchants National Bank. Based upon the representations and requests of the parties set forth in the foregoing stipulations, it is

ORDERED that plaintiff's Complaint and claims for relief against defendants Reyna, Southcoast and Farmers be and the same is hereby dismissed.

IT IS FURTHER ORDERED that each party shall bear its own costs and attorneys' fees.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

APPROVED:

Terry M. Thomas, Esq.
R. Jay Chandler, Esq.
Wesley G. Casey, Esq.
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEYS FOR PLAINTIFF,
BIZJET INTERNATIONAL SALES
& SUPPORT, INC.

Timothy E. McCormick, Esq.
1516 South Boston, Suite 205
Tulsa, Oklahoma 74119

ATTORNEY FOR FARMERS &
MERCHANTS NATIONAL BANK

Jeffrey B. Lathe, Esq.
Northbridge Centre - 15th Floor
Post Office Drawer 3948
West Palm Beach, Florida 33402-3948

ATTORNEY FOR REYNA FINANCIAL
CORPORATION

Daniel A. Hershman, Esq.
Northbridge Tower, 19th Floor
Post Office Drawer 024626
West Palm Beach, Florida 33402

ATTORNEY FOR SOUTHCOAST
BANK CORP.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD BAILEY,

Plaintiff,

v. 89-C-441-B

RICK HUDLEY,

Defendant.

ORDER

The court has before it plaintiff Donald Bailey's civil rights complaint filed pursuant to 42 U.S.C. § 1983. A review of the court file shows that plaintiff was granted leave and filed this action in forma pauperis on July 6, 1989. By letters dated July 11, 1989, and January 8, 1990, the Court Clerk sent Mr. Bailey notice of same and provided summonses for completion, to be issued when returned. The envelope addressed to Mr. Bailey's last known address was returned. Plaintiff has not been in contact with the court since submitting his complaint for filing.

It is therefore ordered that plaintiff Donald Bailey's civil rights complaint pursuant to 42 U.S.C. § 1983 is dismissed without prejudice for failure to prosecute his claim.

Dated this 16 day of February, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 13 1990

U.S. DISTRICT COURT

JOHN BERNARD GRANT,

Petitioner,

v.

89-C-796-B

MIKE PARSONS, WARDEN, and The Attorney General of the State of Oklahoma,

Respondents.

ORDER

Now before the court are respondents' Motion to Dismiss for Failure to Exhaust State Remedies (Docket #4)[1] and petitioner's Traverse (#6). From the record it appears that petitioner pled guilty to Robbery with a Firearm in Case No. CRF-79-396 and to Larceny of an Automobile in CRF-81-341, both after former conviction of a felony. The court sentenced petitioner to two 25-year terms of imprisonment. The convictions were not appealed to the Oklahoma Court of Criminal Appeals.

Petitioner filed an application for relief under the Oklahoma Post-Conviction Procedure Act, 22 O.S. § 1080 et seq. with the District Court on 2-27-85 which was denied. Petitioner appealed the denial to the Oklahoma Court of Criminal Appeals, Case No. PC-85-169. The Court of Criminal Appeals affirmed the denial of post-conviction relief, holding that petitioner's allegations of error were without merit.

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

Subsequently, petitioner filed with the Court of Criminal Appeals two requests for a writ of mandamus in Case Nos. 0-88-455 and 0-88-615. The Court of Criminal Appeals denied both of petitioner's requests.

Petitioner then filed a second request for post-conviction relief, which was denied by the District Court. The Court of Criminal Appeals again affirmed the denial of petitioner's post-conviction relief in Case No. PC-89-612, holding that petitioner failed to file a direct appeal and that post-conviction proceedings should not be a substitute for an appeal.[2]

Petitioner now seeks federal habeas relief on the alleged grounds that: 1) the trial court erred when the original judgment and sentence was amended to enhance petitioner's sentence; 2) the amending of the original judgment and sentence was a breach of the plea bargain agreement entered into by petitioner before the guilty plea was entered; 3) the trial court erred in refusing to grant petitioner's request for a discharge of court-appointed counsel and appointment of new counsel prior to trial; 4) the court erred in denying petitioner's request for a copy of the transcript of the 5/11/81 motion hearing on dismissal of court-appointed counsel; and

---

[2] This court notes that the Court of Criminal Appeals did advise petitioner in Case No. PC-89-612 of the proper procedure he should follow to obtain relief from the state court. The Court of Criminal Appeals stated in its order of denial dated July 24, 1989 as follows:

> The appropriate procedure for petitioner to follow is for him to file a request for an appeal out of time in the District Court. If the District Court grants his request, then he should file a petition for an appeal out of time in this court with a copy of the District Court's order attached to it. This Court will consider the District Court's recommendation and issue an order granting or denying an appeal out of time.

5) the court violated the Speedy Trial Act when 28 months elapsed between the date of arrest and the date of trial.

It is well settled that federal courts should not consider habeas corpus claims until the state courts have had an opportunity to act. Anderson v. Harless, 459 U.S. 4, 6 (1982); Duckworth v. Serrano, 454 U.S. 1, 3-4 (1981); Picard v. Connor, 404 U.S. 270, 275 (1971).

In White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988), the Tenth Circuit stated:

> In order to satisfy the exhaustion requirement, a petitioner is ordinarily required to show either that a state appellate court has had an opportunity to rule on the same claim presented in federal court, or that at the time he filed his federal petition he had no available state avenue of redress. The rationale for this requirement is that state courts will enforce the federal constitution as fully and fairly as a federal court.

(Emphasis added.) (Citations omitted.)

The United States Supreme Court had held that it is only necessary for the federal claim to be "fairly presented" to the state courts. Picard, supra at 275-276. The "fair presentation" standard requires more than that "all the facts necessary to support the federal claim were before the state courts, ... or that a somewhat similar state-law claim was made". Anderson, supra at 6.

The records presented to the court by respondents show that petitioner presented his first three grounds to the state appellate court in his appeal of the district court's denial of his first application for post-conviction relief in Case No. PC-85-169. However, there is no evidence that petitioner has presented his

last two grounds to the state appellate court. Petitioner has presented evidence attached to his brief in support of traverse that he presented these claims to the district court in Case Nos. CRF-79-396 and CRF-81-341. Petitioner alleges that these claims were presented to the state appellate court in Case No. PC-89-612, but the only claims raised in his Petition In Error in that case were that the district court erred when it did not address the individual grounds presented in his first application for post-conviction relief by findings of fact and conclusions of law and did not conduct an evidentiary hearing on those issues.

Furthermore, this court recognizes that petitioner has been provided with an avenue of redress at the state level (see footnote #2). Until petitioner pursues this avenue, the possibility exists that the state appellate court will grant the relief that he seeks.

The court finds that petitioner's petition is indeed a "mixed petition", as claims four and five have not been exhausted in the state courts. Petitioner must exhaust his state court remedies.

It is therefore ordered that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed for failure to exhaust his state remedies.

Dated this 15th day of February, 1990.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 16 1990

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ALFREDO G. SALAZAR, JR., & JANE SALAZAR,

Petitioners,

v.

FEDERAL BUREAU OF INVESTIGATIONS; et al,

Respondents.

89-C-331-B

ORDER

Now before the court is the Petition for a Writ of Prohibition or in the Alternative a Courts [sic] Order in the Form of a Mandamus of Alfredo G. Salazar, Jr., seeking return of one ladies Rolex oyster perpetual date watch with diamonds. The property in question is currently in the possession of the Federal Bureau of Investigation ("FBI") and is the subject of a federal civil forfeiture action, Case No. 89-C-321-B, United States v. One Ladies Rolex Oyster Perpetual Date Watch With Diamonds, filed April 20, 1989, pending before the Honorable Thomas R. Brett. Petitioner asserts that the respondent agencies are unlawfully detaining the watch and that the court should order its return to petitioner's wife based on evidence attached to his petition.

A writ of prohibition is an order of a superior court preventing inferior courts, tribunals, officers or persons from usurping or exercising jurisdiction with which they have not been vested. Rose v. Arnold, 82 P.2d 293, 298 (Okla. 1938). It is not an order affecting private litigants, but rather involves one superior and one inferior court. Its effect is to enjoin the

inferior court from exercising improper authority over a particular pending action.

A court cannot properly issue a writ of prohibition against itself, in an attempt to prevent itself from acting. Ballard v. Spruill, 74 F.2d 464, 466 (D.C.Cir. 1934), cert. den. 296 U.S. 575 (1935), rehrg. den. 296 U.S. 662 (1935). Also, because prohibition cannot affect those without judicial or quasi-judicial functions, courts have refused to issue a writ of prohibition to an executive or administrative body or officer to restrain or control performance of non-judicial functions. Aronoff v. Franchise Tax Board, 383 P.2d 409, 412 (Cal. 1963), app. dismissed, 375 U.S. 451 (1964).

In the instant case, respondents are not serving as a lower court with the power to decide the ultimate disposition of the contested property. By statute, the respondent FBI did at one time possess the authority to declare the property forfeited.[1] However, petitioner's protest, dated August 21, 1988, effectively converted the administrative forfeiture into a judicial forfeiture under 21 C.F.R. § 1316.79.[2]

Clearly, the FBI and its agents are now merely custodians of the disputed property until this court determines its proper

---

[1] 21 C.F.R. § 1316.77(b) states as follows: "For property seized by officers of the Federal Bureau of Investigation, if the appraised value does not exceed the jurisdictional limits in § 1316.75(a), and a claim and bond are not filed within the 20 days hereinbefore mentioned, the FBI Property Management Officer shall declare the property forfeited. The FBI Property Management Officer shall prepare the Declaration of Forfeiture. Thereafter, the property shall be retained in the field office or delivered elsewhere for official use, or otherwise disposed of, in accordance with the official instructions of the FBI Property Management Officer."

[2] 21 CRF § 1316.79(a) states in part: "Any person interested in any property which has been seized, or forfeited either administratively or by court proceedings, may file a petition for remission or mitigation of the forfeiture. Such petition shall be filed in triplicate with the DEA Asset Forfeiture Unit or Special Agent-in-Charge of the DEA or FBI, depending upon which agency seized the property, for the judicial district in which the proceeding for forfeiture is brought."

disposition. Respondents no longer have the authority to decide the question of ownership. Since a writ of prohibition is an injunction issued by one court against the actions of another, it would be an inappropriate measure to apply here since only one court is involved.

Petitioner alternatively seeks a court order in the form of a mandamus in his effort to regain possession of the property in question. Traditionally, federal courts employ this extraordinary writ only for ordering lower courts to refrain from exceeding their jurisdiction or for compelling lower courts to exercise their authority. Kerr v. United States Dist. Court for Northern Dist., 426 U.S. 394 (1976). In view of the fact that the disputed property is the subject of a civil forfeiture action, Case No. 89-C-321-B, United States v. One Ladies Rolex Oyster Perpetual Date Watch With Diamonds, petitioner may appropriately seek to assert his claim of ownership in that proceeding. In apparent recognition of this right, petitioner contacted the Federal Public Defender's Office for appointment of counsel prior to filing his Petition for a Writ of Prohibition or, Alternatively, Mandamus.

Thus, given the facts that only this court is involved in the disposition of petitioner's property and that petitioner may assert his claim in the pending civil forfeiture action, a writ of mandamus cannot lie, for neither the dual tribunal nor the extraordinary circumstances criteria required for issuing such a writ are met here.

In its Motion to Dismiss, the U. S. Attorney's Office has suggested that the petition for a writ is in the nature of a Fed.R.Crim.P. 41(e)[3] motion for return of seized property. Petitioner unequivocally denies this in his Traverse.

Petitioner has requested in his Traverse/Response [to] Defendant's Motion and Brief to Dismiss that the court scrutinize "possible 'in colloque' improprieties" of the Clerk of the U. S. District Court and the U. S. Attorney's Office. The first such alleged impropriety relates to the four-day difference in the acceptance of service of his Writ of Prohibition by the District Court and the U. S. Attorney's Office. Petitioner alleges that this was a stalling tactic designed to "delay the judicial process".

The court notes that, although petitioner mailed both copies at the same time, the courts have received no assurances from the U. S. Postal Service that this will result in delivery of those copies to different addressees in the same building on the same day. Also, the court concludes in response to petitioner's allegation of conspiratorial foot-dragging against the U. S. Attorney's Office that said office received petitioner's mail on a Sunday, which would indicate a more dedicated approach to work than typical footdraggers muster.

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[3] Fed.R.Civ.P. 41(e) reads in pertinent part as follows: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial....

Petitioner also alleges "a possible 'in colloque' impropriety" in that he mailed his petition for a writ of prohibition on April 12, 1989 and included his own in forma pauperis application and affidavit, but the Court Clerk required him to complete the official Tenth Circuit Court of Appeals form prescribed for such a case, which was submitted on April 24, 1989 and granted on May 1, 1989. Petitioner claims that the nineteen-day delay caused by his submission of the unofficial form was part of a court plan "to stall the filing" of his writ. The court finds absolutely no merit to this allegation.

It is noted that it was petitioner's act dated August 21, 1988 that effectively converted the administrative forfeiture into a judicial forfeiture. At that point, when the FBI lost discretion over the property, this court could no longer issue a writ of prohibition against the FBI. Petitioner's Petition for a Writ, filed May 1, 1989, would thus have been ineffective even if filed months rather than days earlier.

Even given the disposition of the courts to construe pro se complaints in the most favorable light possible to impoverished petitioners under Haines v. Kerner, 404 U.S. 519, 520 (1972), the issuance of either writ sought by petitioner is not possible in the case at hand, for their proper legal objective could not be achieved. Dismissal of this petition will not leave petitioner without an appropriate and adequate means of asserting his claim, as the disputed property is the subject of a pending civil action.

It is therefore ordered that petitioner's Petition for a Writ of Prohibition or in the Alternative a Courts [sic] Order in the Form of a Mandamus should be and is denied and this action is dismissed.

Dated this 16th day of Feb, 1990.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 16 1990

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

In Re:

HAROLD WAYNE BURLINGAME, and BARBARA JEAN BURLINGAME, Husband and Wife,

Debtors

THE FIRST NATIONAL BANK & TRUST COMPANY OF TULSA, a national banking association; D.P. BYERS & COMPANY; and P&E COMPANY, Intervenor,

Plaintiffs

HAROLD W. BURLINGAME,

Defendant.

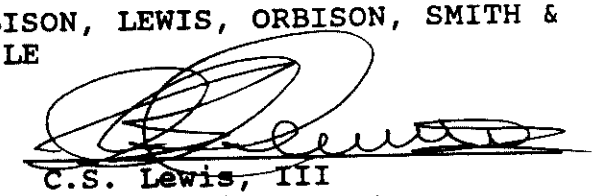
United States District Court Case No. 89-C1080-B

[United States Bankruptcy Court Adv. No. 88-0248-C; Chapter 11 Case No. 88-02062-C;]

DISMISSAL WITH PREJUDICE BY P&E COMPANY

COMES NOW P&E Company and dismisses with prejudice its appeal filed herein and dismisses with prejudice all claims that it has against The First National Bank & Trust Company of Tulsa. This dismissal shall not affect any claims P&E Company has against D.P. Byers & Company.

ROBISON, LEWIS, ORBISON, SMITH & COYLE

By: 

C.S. Lewis, III
1500 Williams Center
Tulsa, OK 74103
(918) 583-1232

Attorneys for P&E Company

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing instrument on this 15 day of ~~January~~ February, 1990 to Michael J. Gibbens at 3800 First National Tower, Tulsa, OK 74103 and Michael E. Yeksavich at 2727 E. 21st Street, Ste. 101, Tulsa, OK 74114 with proper postage prepaid thereon.

C.S. Lewis, III

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAKE UNDERWOOD,)
)
Plaintiff,)
)
v.) M-1579-B
)
RON CHAMPION,)
)
Defendant.)

FILED
FEB 16 1990
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER DENYING PETITIONER LEAVE TO PROCEED
IN FORMA PAUPERIS

In reliance upon the representations and information set forth in the Affidavit of Financial Status, that Petitioner has funds in the amount of $ 347.66 and in view of the filing fee of $5.00 required for this action, it is Ordered that:

The motion for leave to proceed in forma pauperis is, hereby, denied.

Dated this 16th day of February, 1990.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE